No. 97-1230-CFX Title: City of West Covina, Petitioner
v.
Lawrence Perkins, et al.

Docketed: January 27, 1998 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Jan 20 1998	Petition for writ of certiorari filed. (Response due March 28, 1998)
	Feb 25 1998	Order extending time to file response to petition until March 28, 1998.
	Feb 26 1998	Motion of Sixty-seven Cities, Counties and Towns within California for leave to file a brief as amici curiae filed.
	Mar 30 1998	Brief of respondents Lawrence Perkins, et al. in opposition filed.
	Apr 15 1998	DISTRIBUTED. May 1, 1998
	May 4 1998	Motion of Sixty-seven Cities, Counties and Towns within California for leave to file a brief as amici curiae GRANTED.
	May 4 1998	Petition GRANTED. SET FOR ARGUMENT November 3, 1998. **********
	May 18 1998	Order extending time to file brief of petitioner on the merits until July 16, 1998.
	Jun 23 1998	Joint appendix filed.
	Jul 15 1998	Brief of petitioner City of West Covina filed.
	Jul 15 1998	Brief amici curiae of Sixty-two California Cities, Counties and Towns filed.
	Jul 16 1998	Brief amicus curiae of United States filed.
	Jul 16 1998	Motion of National League of Cities, et al. for leave to file a brief as amici curiae filed.
	Jul 16 1998	Brief amici curiae of Ohio, et al. filed.
	Aug 3 1998	Order extending time to file brief of respondent on the merits until September 11, 1998.
	Aug 11 1998	Motion of Ohio for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Aug 27 1998	Motion of National League of Cities, et al. for leave to file a brief as amici curiae GRANTED.
	Sep 9 1998	Motion of Ohio for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Sep 11 1998	Brief of respondents Lawrence Perkins, et al. filed.
	Sep 17 1998	CIRCULATED.
	Oct 13 1998	Record filed.
	Oct 14 1998	Reply brief of petitioner City of West Covina filed.
	Oct 27 1998	Record filed.
	Nov 3 1998	ARGUED.

Supreme Court, U.S.
FILED

(1)

No. 97 1230 JAN 20 1998

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CITY OF WEST COVINA,
Petitioner,

vs.

LAWRENCE PERKINS; CLARA PERKINS;
APRIL PERKINS, a minor, by and through
LAWRENCE PERKINS,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

PRISCILLA F. SLOCUM
Counsel of Record

FRANSCELL, STRICKLAND, ROBERTS & LAWRENCE

225 South Lake Avenue, Penthouse
Pasadena, California 91101
(818) 304-7830

Attorneys for Petitioner

Lawyers Brief Service • Appellate Brief Printers • (213) 613-1013 • (714) 720-1510

94pp

QUESTIONS PRESENTED

1. Whether the procedural component of the Fourteenth Amendment's Due Process Clause requires a police department to provide legal advice and guidance concerning how to pursue post-deprivation judicial remedies for the return of property seized during the execution of a search warrant.

2. Whether the balancing test set forth in Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) should be used by federal courts to expand procedural rights in the context of post-deprivation remedies.

LIST OF PARTIES (Rule 14.1(b))

The petitioner and defendant City of West Covina is the only defendant from the proceedings below involved in this Petition. Other defendants who are not parties to this Petition include defendants Ferrari, Melnyk, Shimanski, Aldecoa, O'Brien, Nalian and Heieck, and the City of Los Angeles.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

LIST OF APPENDICES iv

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL/STATUTORY PROVISIONS . . 2

STATEMENT 2

REASONS FOR GRANTING THE WRIT 6

I. THE COURT OF APPEALS ERRONEOUSLY CREATED A NEW *NOTICE* REQUIREMENT IN POST-DEPRIVATION PROCEDURAL DUE PROCESS CASES IN A MANNER THAT CONFLICTS WITH THIS COURT'S DECISIONS AND DECISIONS IN OTHER CIRCUITS. 6

II. THE QUESTION PRESENTED IS IMPORTANT 15

CONCLUSION 20

LIST OF APPENDICES

APPENDIX A
OPINION, Ninth Circuit Court of Appeals,
Filed May 9, 1997 . . . . . A1

APPENDIX B
Memorandum Order, U.S. District Court,
Central District of California,
Filed May 10, 1994 . . . . . B1

APPENDIX C
JUDGMENT, U.S. District Court,
Central District of California,
Filed August 3, 1994 . . . . . C1

APPENDIX D
NINTH CIRCUIT REMAND ORDER
Filed April 30, 1996 . . . . . D1

APPENDIX E
Memorandum Order, U.S. District Court,
Central District of California,
Filed June 25, 1996 . . . . . E1

APPENDIX F
ORDER DENYING REHEARING,
Ninth Circuit Court of Appeals,
Filed October 22, 1997 . . . . . F1

APPENDIX G
Fourteenth Amendment to the
United States Constitution,
Section 1 . . . . . G1

APPENDIX H
42 U.S.C. § 1983, *as amended by*
Act of Oct. 19, 1996, 110 Stat. 3853
(West Supp. 1997) H1

APPENDIX I
California Penal Code section 1536 . . . . . I1

APPENDIX J
California Penal Code section 1540 . . . . . J1

TABLE OF AUTHORITIES

Cases

Albright v. Oliver, 510 U.S. 266,
114 S.Ct. 807, 127 L.Ed.2d 114 (1994) 16-17

Barnett v. Centoni, 31 F.3d 813 (9th Cir. 1994) 8

Carlo v. City of Chino,
105 F.3d 493 (9th Cir. 1997) 20

Decker v. Hillsborough County Attorney's Office,
845 F.2d 17 (1st Cir. 1988) 8

Dixon v. Love, 431 U.S. 105,
97 S. Ct. 1723,
52 L. Ed. 2d 172 (1977) 7

Easter House v. Felder,
910 F.2d 1387 (7th Cir. 1990) 9,10-11

Economic Dev. Corp. v. Stierheim,
782 F.2d 952 (11th Cir. 1986) 11

Graham v. Connor, 490 U.S. 386,
109 S. Ct. 1865,
104 L. Ed. 2d 443 (1989) 16

Hudson v. Palmer, 468 U.S. 517,
104 S. Ct. 3194,
82 L. Ed. 2d 393 (1984) 10,11,13,16,18,19

Mathews v. Eldridge, 424 U.S. 319,
96 S. Ct. 893,
47 L. Ed. 2d 18 (1976) 5,7,12,15,19

Memphis Light, Gas, & Water Div. v. Craft,
436 U.S. 1, 98 S. Ct. 1554,
56 L. Ed. 2d 30 (1978) 5,7,12,13,15

Murphy v. Collins,
26 F.3d 541 (5th Cir. 1994) 8

New Alaska Dev. Corp. v. Guetschow,
869 F.2d 1298 (9th Cir. 1989) 8

Parratt v. Taylor, 451 U.S. 527,
101 S.Ct. 1908,
68 L.Ed.2d 420 (1981) 4, 8-9, 11, 16-19

Ramsey v. Board of Education of Whitley County,
844 F.2d 1268 (6th Cir. 1988) 8

United States v. An Article of Device "Theramatic",
715 F.2d 1339 (9th Cir. 1983) 8-9

Texaco, Inc. v. Short,
454 U.S. 516, 102 S. Ct. 781,
70 L. Ed. 2d 738 (1982) 14

Vicory v. Walton,
721 F.2d 1062 (6th Cir. 1983),
cert. denied, 469 U.S. 834 (1984) 9,18

Zinermon v. Burch, 494 U.S. 113,
110 S. Ct. 975,
108 L. Ed. 2d 100 (1990) 8

Statutes and Rules

California Penal Code

§ 1536 3,4,11

§ 1540 4,11

Statutes

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2101(c) 2

42 U.S.C. § 1983 2,6,9-11,15,17-19

Rules

U.S. Supreme Court Rule 13.4 2

U.S. Supreme Court Rule 14.1(b) ii

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit was reported at 113 F.3d 1004 (9th Cir. 1997), was filed on May 9, 1997, and is reprinted at Appendix A.

The United States District Court of the Central District of California's unreported memorandum order postponing and bifurcating the respondent's procedural due process claim was filed on May 10, 1994, and is reprinted at Appendix B.

The United States District Court of the Central District of California's unreported memorandum order granting petitioner City of West Covina's motion for summary judgment on the procedural due process claim was filed on June 25, 1996, and is reprinted at Appendix D.

JURISDICTION

Petitioner City of West Covina respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered on May 9, 1997. (App. A 1.)

The United States District Court of the Central District of California's Judgment was filed on August 3, 1994, and is reprinted here as Appendix C. On May 23, 1997, petitioner filed a timely petition for rehearing and suggestion for rehearing en banc in the Ninth Circuit. On October 22, 1997, the Ninth Circuit denied the petition for rehearing, and rejected the suggestion for rehearing en banc. (App. F1.) One active judge requested a vote on whether to rehear the matter en banc, but the matter failed to receive a majority of the votes of the nonrecused active judges. (Id.)

The petition is filed within 90 days of the entry of such denial pursuant to 28 U.S.C. § 2101 (c) and U.S. Supreme Court Rule 13.4. The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. section 1254(1).

CONSTITUTIONAL/STATUTORY PROVISIONS

The following statutory and constitutional provisions relevant to this petition are set forth in appendices as follows:

1. Fourteenth Amendment of the United States Constitution, Section 1 at Appendix G

2. 42 U.S.C. Section 1983 at Appendix H

3. California Penal Code section 1536 at Appendix I

4. California Penal Code section 1540 at Appendix J

STATEMENT

Plaintiffs and Respondents Clara and April Perkins sued the City of West Covina (hereinafter "City") and various detectives and officers of the City of West Covina, alleging various Fourth Amendment violations arising out of the execution of a search warrant, and seizure of a "starter pistol" and $2,469.00 in cash.

On May 10, 1994, the district court granted summary adjudication in favor of the individual officers with respect to several of respondents' Fourth Amendment claims against the individual officers, and granted summary adjudication in favor of the City insofar as it sought to state a claim against the City for the police officer's search of respondents' residence. (App. B 4.) However, the

district court postponed ruling on an *unalleged* procedural due process claim that the post-deprivation judicial remedy for return of the seized property was inadequate, and ordered further briefing. (App. B 6-7.) Respondent never filed an amended complaint adding this unalleged claim, and the district court did not rule on this claim prior to entry of the final judgment.

Judgment was entered in favor of all these defendants on August 4, 1994, and respondent appealed on August 31, 1994. (App. C 1). On April 30, 1996, the Ninth Circuit remanded the case to the district court to clarify and resolve the procedural due process issue. (App. D 1.)

On remand, the district court granted summary judgment in favor of the City, holding that respondent waived any claim concerning the adequacy of the post-deprivation judicial remedy provided by Penal Code section 1536, which provides that

> All property or things taken on a warrant must be retained by the officer in his custody, subject to the order of the court to which he is required to return the proceedings before him, or of any other court in which the offense in respect to which the property or things taken is triable.

The court reasoned that the waiver rule applied because "'the evidence shows at most that the respondent made one trip to the Municipal Court, was advised that there was no file in his name and ceased any efforts to obtain an order returning his property. He filed nothing, he made no inquiry about the procedures . . . .'" (App. E 7.)

The district court also refused to excuse respondents' failure to avail themselves of this judicial/statutory remedy on the grounds that the City failed to give "notice" of the remedy. (App. E 7.) The court found that respondent "was told that he had to get a court order to get his property back, he was told what court and what judge to go to, and he was given the date of the warrant and of the

search." (App. E 7.) Therefore, "[t]he City's failure to give Perkins formal notice of the procedure did not render that procedure "inadequate to the point that it [wa]s meaningless or nonexistent." (Id.)

On appeal, a two-judge majority of the Ninth Circuit Court of Appeals reversed summary judgment in favor of the City, and directed the district court to enter summary judgment in favor of respondents. The court of appeals determined that under Parratt v. Taylor, 451 U.S. 527, 539, 101 S. Ct. 1908, 1915, 68 L. Ed. 2d 420 (1981), there was "no requirement of a prior hearing before the seizure of possessions under the search warrant." The court also found that California Penal Code sections 1536, 1540, and state mandamus proceedings, provided "adequate" post-deprivation judicial remedies to recover the property. (App. A 17; App. J, K.)

The court of appeals acknowledged that respondents were told by a City police officer that they had to obtain a court order for the return of the property, and acknowledged that the officers executing the warrant left a note at the search site which stated:

To Whom it May Concern:

1. These premises have been searched by peace officers of the West Covina Police Department pursuant to a search warrant issued on 5-20-93, by the Honorable Dan Oki, judge of the Municipal Court, Citrus Judicial District.

2. The search was conducted on 5-21-93. A list of the property seized pursuant to the search warrant is attached.

3. If you wish further information, you may contact Det. Ferrari or Det. Melnyk at [telephone number].

(App. A 4-5.) The form also listed "Lt. Schimanski"'s name and his telephone number. (App. A 5.)

The court of appeals also acknowledged that "the search warrant was listed in a public document with the court clerk by the address where the search occurred, along with the number of the search warrant." (App. A 6.)

Nonetheless, the court held that petitioner violated respondents' procedural due process rights by failing to provide adequate post-deprivation "notice" of this judicial remedy which, according to the court, was required under Memphis Light, Gas, & Water Div. v. Craft, 436 U.S. 1, 98 S. Ct. 1554, 56 L. Ed. 2d 30 (1978), and the balancing test set forth in Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). (App. A 17-20.) Specifically, the City violated respondents' rights by failing to include in the note left at the search site "the availability of a judicial remedy should he wish to claim his property," or to "provide some guidance for invoking that remedy." (App. A 18.) The court held that, at minimum, the "note" left on the premises must not only include the information which was provided in this particular case, but also the following:

> the notice must inform the recipient of the procedure for contesting the seizure or retention of the property taken, along with any additional information required for initiating that procedure in the appropriate court. In circumstances such as those presented by this record, the notice must include the search warrant number or, if it is not available or the record is sealed, the means of identifying the court file. It also must explain the need for a written motion or request to the court stating why the property should be returned.

(App. A 22.)

At the same time, however, the court of appeals acknowledged that the trial court has exclusive authority

over the procedures for obtaining the release of seized property:

> "[o]fficers seizing property do so on behalf of the court for use in a judicial proceeding, and they must respond to court orders to release the property. (Citation). The officers have no right in the property or in its possession, *and have no authority over it except as the court may order.*" (Citation [emphasis added].)

(App. A 16.)

REASONS FOR GRANTING THE PETITION

This Court should grant the Petition for Certiorari. The court of appeals creation of a new procedural right to "notice" in the form of legal advice concerning post-deprivation judicial remedies is not only erroneous, but also inconsistent with decisions of this Court and decisions in numerous circuit courts of appeals. Moreover, by imposing section 1983 liability under this new procedural right over and above that provided by admittedly adequate state law remedies, the published decision raises serious concerns relating to principles of comity and federalism.

I. THE COURT OF APPEALS ERRONEOUSLY CREATED A NEW *NOTICE* REQUIREMENT IN POST-DEPRIVATION PROCEDURAL DUE PROCESS CASES IN A MANNER THAT CONFLICTS WITH THIS COURT'S DECISIONS AND DECISIONS IN OTHER CIRCUITS.

This Court's decisions, as well as the decisions in other circuits, have recognized two different categories of

procedural due process claims, and have articulated a framework for determining whether the particular procedures at issue provide due process. In "pre-deprivation" cases, a public entity (usually, an administrative agency) has authorized certain procedures to be followed before a deprivation can occur. In this category of cases, the Court employs the balancing test set forth in Mathews v. Eldridge, supra, to determine whether the "notice" given and the procedures made available provide an meaningful opportunity to be heard prior to the deprivation of a property or liberty interest. Mathews v. Eldridge, 424 U.S. at 341-349, 96 S. Ct. at 905-910 (weighing the disability claimant's interest in continued disability benefits, the fairness and reliability of existing pre-termination procedure, the probable value of additional procedural safeguards, and the burden of such additional safeguards, due process does not require an evidentiary hearing prior to the discontinuance of disability benefits); Memphis Light, Gas, & Water Div. v. Craft, 436 U.S. 1, 16-19, 98 S. Ct. 1554, 1564-65 (Mathews factors require, municipal utility company to provide notice of internal procedures for protesting the proposed termination of utility services before termination); Dixon v. Love, 431 U.S. 105, 112-115, 97 S. Ct. 1723, 1727-29, 52 L. Ed. 2d 172 (1977) (no evidentiary hearing required under Mathews factors prior to revocation of license for outstanding traffic tickets because respondent has opportunity for full judicial hearing in the underlying traffic convictions).

However, this Court, as well as other circuit courts, also recognize a second category of cases which involve "post-deprivation" judicial or statutory remedies to correct a deprivation that has already occurred. In these cases the analysis set forth in Mathews v. Eldridge, supra, has been applied in determining whether some form of pre-deprivation notice and hearing is required, and the court has determined that "the value of predeprivation safeguards

[e.g., notice and an opportunity to be heard before the deprivation] -- is negligible in preventing the kind of deprivation at issue." Zinermon v. Burch, 494 U.S. 113, 129, 110 S. Ct. 975, 985, 108 L. Ed. 2d 100 (1990); see also Decker v. Hillsborough County Attorney's Office, 845 F.2d 17 (1st Cir. 1988) (state's failure to return a criminal defendant's property to him immediately upon his acquittal did not constitute deprivation of property without due process because the state statute provided judicial procedures through which to assert his property right); Murphy v. Collins, 26 F.3d 541, 543 (5th Cir. 1994) (no procedural due process violation where prisoner's property confiscated in violation of the prison's procedures because prisoner could pursue a tort action for conversion); Ramsey v. Board of Education of Whitley County, 844 F.2d 1268 (6th Cir. 1988) (no procedural due process violation where school district unilaterally reduced teacher's compensation for sick leave days because teacher could pursue breach of contract action); Barnett v. Centoni, 31 F.3d 813, 816 (9th Cir. 1994) (no procedural due process violation where a state inmate's prison status was downgraded in a disciplinary action because California law provided an adequate post-deprivation remedy for any property deprivation); New Alaska Dev. Corp. v. Guetschow, 869 F.2d 1298, 1305 (9th Cir. 1989) (the *availability* of "post-deprivation state law remedies provides all the process due" for a court-appointed receiver's alleged misappropriation of funds in a divorce proceeding).

In post-deprivation cases, the available judicial or statutory remedies are not inadequate simply because recovery might be difficult, time-consuming, speculative, or uncertain). Parratt v. Taylor, 451 U.S. at 543-44, 101 S. Ct. at 1917 (since the state tort remedy was available at the time of the plaintiff's loss and he failed to use it, he failed to state a procedural due process claim); United States v. An Article of Device "Theramatic", 715 F.2d

1339, 1342-43 (9th Cir. 1983) (rejecting plaintiff's claim that a post-seizure judicial hearing was inadequate because it put the "burden on defendant to request a hearing"); Easter House v. Felder, 910 F.2d 1387, 1405-06 (7th Cir. 1990); Vicory v. Walton, 721 F.2d 1062, 1065-66 (6th Cir. 1983), *cert. denied*, 469 U.S. 834 (1984) ("in section 1983 damage suits for deprivation of property without procedural due process the plaintiff must plead and prove that state remedies for redressing the wrong are inadequate").

All of these decisions hold that the *availability* of adequate post-deprivation judicial or statutory remedies satisfies the procedural component of the Due Process Clause if the remedies provide the aggrieved party with an adequate mechanism to correct a deprivation that has already occurred. None of these cases even remotely suggest that due process requires a municipality, who has no authority over the property in question or the procedures necessary to invoke these remedies, to provide advance legal advice or information concerning how to pursue the remedies after a deprivation has occurred but before an aggrieved party invokes the judicial remedy.

In Parratt v. Taylor, 451 U.S. 527, 101 S. Ct. 1908, 1917, prison officials lost a prisoner's personal property. After balancing the relevant interests, this Court determined that the normal "predeprivation notice and opportunity to be heard" was "pretermitted," and that the state tort claims act provided an adequate post-deprivation remedy. (Id. at 538-539, 541, 543-44, 101 S. Ct. 1914, 1916-17.) This Court rejected plaintiff's claim that the state tort claims remedy for unlawful destruction of property was inadequate because "it provides only for an action against the State as opposed to its individual employees, it contains no provisions for punitive damages, and there is no right to a trial by jury." 451 U.S. at 543-44, 101 S. Ct. at 1917. The court reasoned thus:

> Although the state remedies may not provide the respondent with all the relief which may have been available if he could have proceeded under § 1983, that does not mean that the state remedies are not adequate to satisfy the requirements of due process.

Id. at 543, 101 S. Ct. at 1915. Since the state tort remedy was available at the time of the plaintiff's loss and he failed to use it, he failed to state a procedural due process claim. Id.

Similarly, in Hudson v. Palmer, 468 U.S. 517, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984) a prisoner alleged that during the search of his cell, a prison guard deliberately and maliciously destroyed some of the prisoner's possessions. This Court determined that correctional officers were not in a position to provide a predeprivation procedure, and that under Virginia law, the prisoner's right to sue the correctional officer under state law for conversion or detinue provided all the process that was due. Id. at 534-35, 104 S. Ct. at 3204. The Court rejected plaintiff's argument that state law remedies should be deemed inadequate because they were "far from certain and complete," observing that the fact that an injured party "might not be able to recover under [state law] remedies the full amount which he might receive in a section 1983 action is not . . . determinative of the adequacy of the state remedies. (Citation)" 468 U.S. at 535, 104 S. Ct. at 3204-05.

Similarly, in Easter House v. Felder, 910 F.2d 1387, 1405-06 (7th Cir. 1990), plaintiff, a daycare provider, sued a state licensing agency and its employees for allegedly depriving them of a property interest because of the agency's delay in renewing the provider's daycare license. The court held that various post-deprivation tort remedies provided all the process that was "due" even though "the state road to recovery" might be a "lengthy and speculative process":

> We note that almost all litigation, whether conducted in a state or federal forum, may be characterized as a lengthy and speculative process. Litigants often decry the speed with which court's administer justice and likewise lament that a particular forum may yield a more favorable result depending upon the nature of the claim and the particular position they support. However, we should not reject the application of Parratt unless the remedy which an injured party may pursue in state court can be readily characterized as inadequate to the point that it is meaningless or nonexistent and, thus, in no way can be said to provide the due process relief guaranteed by the fourteenth amendment.

Id. at 1406; see also, Economic Dev. Corp. v. Stierheim, 782 F.2d 952, 955-56 (11th Cir. 1986) (state law tort remedies provide all the process that is due even if relief under section 1983 would be greater).

As the majority acknowledges, under California law the authority over these judicial remedies is vested exclusively in the court system. (App. A 16.) As such, the judicial remedies are indistinguishable from the category of judicial or statutory remedies available to civil rights plaintiffs in cases such as Parratt v. Taylor, supra, Hudson v. Palmer, supra, and numerous decisions in the circuit courts of appeal.

Despite these decisions, the court of appeals essentially concluded that a municipality's failure to provide adequate advice at the search site concerning how to pursue the judicial remedies available under California Penal Code sections 1536 and 1540 rendered the judicial remedy too burdensome. Clearly, the decision is based on the same argument repeatedly *rejected* by this Court and other circuit courts, namely, that a post-deprivation remedy is

inadequate if the remedy is burdensome, lengthy, uncertain, or speculative.

Moreover, the analysis set forth in Mathews v. Eldridge, supra, and applied in Memphis Light, Gas, & Water Div. v. Craft, supra, provides no support for this expansion of procedural rights in the context of post-deprivation remedies. In Memphis Light, this Court held that a municipal utility agency subject to control by the municipality had a constitutional duty to provide "notice" of available internal administrative procedures for disputing utility bills prior to discontinuance of gas and electricity. 436 U.S. at 4, 14-15, 98 S. Ct. at 1557, 1563. Two critical facts, absent in the present case, were essential to this Court's determination. First, the municipal utility had authority over the "res" in question, namely, the distribution of utility services deemed to be "essential" to the health and well-being of customers. Id. at 4, 19-20, 98 S. Ct. at 1537, 1559, 1565.

Second, the municipal utility had developed dispute resolution procedures as required by state law. Id. at 15, 98 S. Ct. at 1563, n. 16. Pursuant to that authority, the utility developed detailed internal procedure for the resolution of disputed bills prior to a proposed termination. Id. at 5, n. 4, 13, 98 S. Ct. at 1559, n. 4, 1562 ("'The billing of customers, the determination as to when a final notice is sent, and the termination of service [are] governed by policies, rules and regulations adopted and approved by the Board of Commissioners of MLG&W.' (Citation)."). In other words, the municipal utility's duty to provide such procedures and its *authority* over the distribution of the property at issue gave rise to a constitutional duty to provide adequate "notice" of its internal administrative procedure prior to a termination of *life-essential* utility services.

In the present case, state law does not impose a duty on municipalities to provide procedures for the return of

seized property, but imposes that duty on the court. Moreover, a municipality has no authority over the disposition of property seized pursuant to a search warrant and, unlike the property in Memphis Light, supra, such property is not "essential" to well-being and health of the aggrieved party. As the court of appeals acknowledged, California *courts* have exclusive authority over such property, and policing agencies cannot release property it except by court order. (App. A 16.) While a municipality may have information that might be helpful to pursue these remedies, it does not follow that it has a constitutional duty to provide that information after a deprivation has already occurred and before an aggrieved party seeks to invoke the remedy. Cf. Hudson v. Palmer, 468 U.S. at 534 (rejecting argument that "because an agent of the state who intends to deprive a person of his property can provide predeprivation process, then as a matter of due process he must do so.")

Because the court of appeals ignored these critical distinctions altogether, it is unsurprising that the court also erroneously assumed that a municipality--rather than the courts or respondents' counsel--was required to provide information concerning how to invoke and pursue this judicial remedy.[1]

---

[1] Petitioners note that although respondents argued that they were not given "notice" of the relevant judicial remedies, the court of appeals--not the respondents--articulated this new theory based on the analysis set forth in Memphis Light, supra, a decision that was neither cited nor briefed by the parties. As a result, the two-judge majority articulated a new procedural right without the benefit of an adversarial perspective that could have been presented had the court requested additional briefing, further oral argument, or granted the petition for rehearing and suggestion for

For example, the court of appeals chastised the police department for failing to

> mention the availability of any procedure for protesting the seizure of his property, let alone the existence of a formal judicial procedure for obtaining return. It did not provide essential information necessary to invoke that procedure: the search warrant number, the method for obtaining the number from the municipal court (such as the need to furnish the court with the address searched), or the necessity of a written request for return of the property.

(App. A 19.)

Two erroneous assumptions underlie this conclusion. First, as the court of appeals acknowledges, the police department advised respondent and his counsel of this "judicial remedy," but respondents failed to pursue it *through the court system*. (App. A 5; E 3.) However, it is largely irrelevant whether or not respondents were informed by the *police department* what their judicial remedies were--the judicial remedies are provided by law, and respondents are presumed to know the law. Texaco, Inc. v. Short, 454 U.S. 516, 533, 102 S. Ct. 781, 793-794, 70 L. Ed. 2d 738 (1982) ("It is well established that persons owning property within a State are charged with knowledge of relevant statutory provisions affecting the control or disposition of such property.")

Second, the court of appeals references "a number of telephone calls [made by respondents] to the city's police station . . . and a trip to the municipal court." (App. A 19.) The majority appears to conclude that the police department had a constitutional duty to inform respondents of the *court's* procedures for obtaining the release of the

---

rehearing en banc.

property. (App. A 22 ("the notice must inform the recipient of the procedure for contesting the seizure or retention of the property taken") Unfortunately, the court of appeals' conclusion ignores the fact that a police department has no authority over how these judicial procedures operate.

Moreover, nothing in the record supports the court's conclusion. Respondent failed to introduce any evidence concerning what the proper court procedures were for invoking and pursuing this remedy, or what information they lacked which was necessary to pursue this remedy. (App. E 6 ("there is no evidence either way about whether one must have the warrant number in order to obtain a court order releasing seized property").

A municipality has no authority over court procedures governing the return of lawfully seized property, anymore than a municipality has control over the means through which a tort action can be prosecuted. Nonetheless, the court of appeals, on pain of section 1983 liability, has imposed an on-going *constitutional* duty on police departments to research, monitor, and identify potential weaknesses in these court procedures relating to the return of seized property, and to provide information concerning these court procedures after a deprivation has occurred but before the remedy is invoked by an aggrieved party. This result not only ignores this Court's decisions relating to post-deprivation remedies--which place the burden on an aggrieved party to avail himself of "adequate" post-deprivation judicial or statutory remedies--but also finds no support in Memphis Light, supra.

II. THE QUESTION PRESENTED IS IMPORTANT.

The two-judge majority's use of the Mathews analysis to create new "procedural" rights in the area of post-

deprivation remedies is also inconsistent with this Court's continued efforts to prevent federal courts from converting the Fourteenth Amendment into *"a font of tort law to be superimposed upon whatever systems may already be administered y the States."* Parratt v. Taylor, 451 U.S. at 544, 101 S. Ct. 1917.

Understandably concerned with principles of comity and federalism, this Court has attempted to curtail efforts by federal courts to expand substantive and procedural rights under the Due Process Clause. Efforts to expand substantive rights under the Fourteenth Amendment were rebuked by this Court in Graham v. Connor, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989), and Albright v. Oliver, 510 U.S. 266, 114 S. Ct. 807, 127 L. Ed. 2d 114. In these decisions, the Court expressed concern over the constitutionalization of state law by the creation of additional "substantive" due process rights over and above those rights that are already protected under specific provisions of the Bill of Rights. 490 U.S. at 394-395, 109 S. Ct. at 1870-1871; 510 U.S. at 273-74, 114 S. Ct. at 813.

Similarly, this Court has rebuked efforts to expand procedural rights in cases such as Parratt v. Taylor, supra, and Hudson v. Palmer, supra, where a state has eliminated the need for federal protection by providing adequate post-deprivation judicial or statutory remedies. In Parratt v. Taylor, the Court relied on principles of comity and federalism to reject a prison inmate's argument that he had a right to predeprivation procedures even though the state provided an adequate tort remedy to compensate him for the loss of his property interest:

> To accept respondent's argument that the conduct of state officials in this case constituted a violation of the Fourteenth Amendment would necessarily result in turning every alleged injury which may have been inflicted by a state official . . . into a violation

> of the Fourteenth Amendment cognizable under § 1983. It is hard to perceive any logical stopping place to such a line of reasoning. Presumably, under this rationale any party who is involved in nothing more than an automobile accident with a state official could allege a constitutional violation under § 1983. Such reasoning "would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States. (Citation)."

Id. at 544, 101 S. Ct. 1917.

More recently, members of this Court in Albright v. Oliver, supra, recognized the importance of these principles. In Albright v. Oliver, justices Kennedy and Thomas found that the availability of an alternative state remedy for malicious prosecution precluded a claim under the Due Process Clause for initiation of criminal charges without probable cause, reasoning thus:

> The commonsense teaching of *Parratt* is that some questions of property, contract, and tort law are best resolved by state legal systems without resort to the federal courts, even when a state actor is the alleged wrongdoer. As we explained in *Parratt*, the contrary approach 'would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under 'color of law' into a violation of the Fourteenth Amendment cognizable under § 1983 . . . . The *Parratt* principle respects the delicate balance between state and federal courts and comports with the design of § 1983, a statute that reinforces a legal tradition in which protection for persons and their rights is afforded by common law and the laws of the states, as well as by the Constitution. (Citation.)

510 U.S. at 283, 114 S. Ct. at 818-19.

Vicory v. Walton, 721 F.2d 1062, 1063 (6th Cir. 1983), *cert. denied*, 469 U.S. 834 (1984) provides a persuasive analysis of the principles of comity and federalism that have informed this Court's efforts to contain efforts to constitutionalization of state law remedies. In Vicory v. Walton, plaintiffs, owners of a mobile trailer seized for purposes of a criminal investigation and trial sued the City for retaining the trailer without due process of law. The court of appeals held that state tort remedies provided all the process that was due. Id. at 1065.

Foreshadowing this Court's decision in Hudson v. Palmer, supra, the court of appeals rejected plaintiff's claim that the Parratt rule did not apply to "intentional" conduct. The court reasoned that "the principle being applied does not turn on the question of whether the claimed constitutional tort affecting property is caused by intentional conduct or negligent conduct," but reflects the Supreme Court's basic determination to limit federal hearings "in procedural due process cases that can be corrected in state court." Id. at 1065. Therefore,

> [s]o long as a state's damage remedies are not shown to be inadequate in theory or practice---that is, so long as there is no systemic problem with the state's corrective process---we see no purpose to be served by further complicating section 1983 liability for damages in property cases by distinctions grounded in different types of intent, negligence and strict liability.

Similarly, in the present case respondents simply failed to present any evidence of a "systemic" problem with California's judicial remedy for the return of lawfully seized property. Nonetheless, the court of appeals created a new procedural due process right to legal advice based on respondents' inability or unwillingness in this single instance to obtain the necessary information and relief after

one visit to the court. Respondents' counsel simply failed to take the legal steps necessary to pursue this post-deprivation judicial remedy.

In light of these decisions, it is unlikely that this Court intended the analysis set forth in Mathews v. Eldridge, supra, to be used to expand procedural rights where the only evidence of "inadequacy" of a post-deprivation judicial remedy is an aggrieved party's initial difficulty in pursuing the remedy in court. The creation of this new "notice" element to assess the adequacy of post-deprivation judicial and statutory remedies not only intrudes into state's authority in the area of law enforcement, but also promises to intrude into other areas which have traditionally been regulated by the states.

In this particular case, the Ninth Circuit has imposed a burden on police departments to research court procedures--which may vary from time to time and from court to court--concerning the precise manner in which property obtained under a valid search warrant may be recovered. To avoid section 1983 liability, municipalities must fashion some sort of "notice" in the form of legal advice, update the required legal advice by monitoring court processes for any relevant changes in procedure, and provide the necessary information after a deprivation has occurred but before an aggrieved party pursues the judicial remedy.

Moreover, the Ninth Circuit's rationale promises to pave the way for further federal intrusion into areas which traditionally have been relegated to the states. It takes little imagination to predict the Ninth Circuit's next step, namely, to require public agencies--who have no authority or control over existing state law judicial and statutory remedies recognized in cases such as Parratt, supra, Hudson, supra, and numerous other circuit court decisions-

-to provide legal advice and information concerning how to pursue these remedies.[2]

CONCLUSION.

The petition should be granted.

DATED: January 19, 1998

Respectfully submitted,
PRISCILLA F. SLOCUM

FRANSCELL, STRICKLAND,
ROBERTS & LAWRENCE
Attorneys for Petitioner
City of West Covina

---

[2] Having been thwarted by this Court's efforts to expand federal rights under the substantive component of the Due Process Clause, it appears that some members of the Ninth Circuit are now attempting to expand federal rights under the procedural component of the Due Process Clause. In Carlo v. City of Chino, 105 F.3d 493 (9th Cir. 1997), the Ninth Circuit created a new avenue for constitutionalizing state law. The court of appeals, in an opinion authored by Judge Boochever, held that a violation of a state criminal procedure statute--which requires a police officer to provide a detainee with immediate post-booking telephone calls and on pain of criminal prosecution--gives rise to section 1983 liability under the "procedural" component of the Due Process Clause. The decision is currently pending before this Court in a Petition for Certiorari. Hector Guerra v. Mary Ann Carlo, No.97-715.

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAWRENCE PERKINS; CLARA PERKINS; APRIL PERKINS, a minor, by and through Lawrence Perkins, *Plaintiffs-Appellants,* v. CITY OF WEST COVINA; Detective Ferrari; Detective Melnyk, *Defendants-Appellees.*	) No. 94-56365) D.C. No.) CV-93-07084-) SVW) OPINION

Appeal from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

Argued and Submitted March 7, 1996
Submission Withdrawn April 30, 1996
Resubmitted September 30, 1996---Pasadena, California

Filed May 9, 1997

Before: William C. Canby, Jr., Robert Boochever, and Edward Leavy, Circuit Judges.

Opinion by Judge Boochever; Partial Concurrence and Partial Dissent by Judge Leavy

COUNSEL

Patrick S. Smith, Klass, Helman & Ross, Los Angeles, California, for the plaintiffs-appellants.

S. Frank Harrell, Franscell, Strickland, Roberts & Lawrence, Santa Ana, California, for the defendants-appellees.

OPINION

BOOCHEVER, Circuit Judge:

Lawrence, Clara, and April Perkins appeal the district court's grant of summary judgment on their 42 U.S.C. § 1983 suit against the city of West Covina, and the court's grant of qualified immunity to individual police officers. City detectives searched Perkins' home in connection with a murder investigation involving a former boarder. Perkins had difficulty securing the recovery of his property seized during the search, including cash and a starter pistol.

Perkins claims the individual officers violated his clearly established Fourth and Fourteenth Amendment rights during the search. He also claims that the city's notice of the procedure for retrieving the property, and the procedure itself, were inadequate, and therefore violated his right to due process. We affirm the district court's grant of summary judgment to the individual defendants on the ground of qualified immunity. We reverse the summary judgment in favor of the City, however, because we conclude that the City's policy

violated due process by failing to notify Perkins of the means of retrieving his seized property.

FACTS

On May 8, 1993, Julio Alberto Clark was shot to death at the home of Lashaun McDuffy in West Covina, California. When West Covina police searched McDuffy's residence, they found evidence linking McDuffy's boyfriend, Marcus Marsh (a.k.a. Marcus Winter) ("Marsh"), to the murder. They also found evidence of gang activity, a vial of rock cocaine, and $994.00 in cash.

McDuffy gave the police Marsh's telephone number, which the police traced to the home of the plaintiffs and appellants in this case, Lawrence, Clara, and April (a minor child) Perkins, at 531 Balham Avenue in La Puente, California. Another officer confirmed the address with Marsh's probation officer, and documents found in Marsh's car contained the same address. Marsh had rented a room from Perkins, although Perkins later stated that at the time of the search Marsh had moved out.

On May 20, 1993, Citrus Municipal Court Judge Dan Thomas Oki signed a search warrant authorizing a search of "all rooms, attics, basements, garages, and other parts therein" of four addresses, including Perkins' home. The warrant authorized a search for "any evidence of street gang membership or affiliation with a street gang," and "any firearms of the following caliber, 9MM. In addition. . .any and all firearms for which the person in possession of said firearms cannot tender proof of ownership at the time of service."

West Covina detectives David Melnyk, Michael Ferrari, Dan Nalian, and Lieutenant John Schimanski searched the Perkins' home on May 21. No one was home, and Detective Nalian later stated that he and the other officers did not know which was Marsh's bedroom. During the search, the officers seized gang photos (some depicting Marsh), paperwork belonging to Marsh, and an address book belonging to Lawrence Perkins. They also seized a twelve-gage shotgun and various kinds of ammunition. From the closet in a locked southwest bedroom, the officers seized a starter pistol and $2,469 in cash. Detective Ferrari testified that he reasoned it was evidence within the scope of the search warrant because the detectives had recovered narcotics and cash from McDuffy's house, and Detective Nalian stated that he considered the cash "evidence that Marcus Marsh, and perhaps other residents of the house were involved in illegal drug and gang related criminal activity."

The house was left in disarray, with damage to the doors and some personal items. The officers left a form entitled "Search Warrant: Notice of Service" ("the notice"). The notice stated:

To Whom it May Concern:

1. These premises have been searched by peace officers of the West Covina Police Department pursuant to a search warrant issued on 5-20-93, by the Honorable Dan Oki, judge of the Municipal Court, Citrus Judicial District.

2. The search was conducted on 5-21-93. A list of the property seized pursuant to the search warrant is attached.

3. If you wish further information, you may contact Det. Ferrari or Det. Melnyk at [telephone number].

The form also listed the name "Lt. Schimanski" and his telephone number. It did not include the search warrant number.

Lawrence Perkins ("Perkins") called Detective Ferrari that day; Detective Ferrari told him to call back a few days later. Perkins called back and came in to talk to Detective Ferrari, who told him that he had no objection to releasing the money, but Perkins would need to get a court order to get the property returned. Perkins testified, and Detective Ferrari denied, that Detective Ferrari said he would help Perkins get the property back if Perkins would testify against Marsh.

Perkins attempted to obtain the court order. About a month after the search, Perkins went to Citrus Municipal Court and asked to see Judge Oki, but was told Judge Oki was on vacation. He attempted to get another judge to release the property, but Perkins was informed that there was nothing under his name, and that he needed the number of the search warrant, or a case number in Marsh's case. Although Detective Ferrari believed he gave Perkins the search warrant number, Perkins testified that it was the wrong number. Perkins also testified that he was unable to get the correct warrant number at the court because the warrant was sealed and no file number was assigned. There was no

case number for Marsh because charges had not yet been filed. The search warrant, however, was listed in a public document with the court clerk by the address where the search occurred, along with the number of the search warrant. Perkins was apparently unaware of this, and no city employee informed him of the method for obtaining the number.

Perkins, Clara Perkins, and April Perkins filed suit in district court on November 19, 1993, against the city of West Covina, Detectives Ferrari and Melynk, Lieutenant Schimanski, and Los Angeles County. The complaint alleged that the individual defendants violated the Perkins' Fourth and Fourteenth Amendment rights under 42 U.S.C. § 1983 by their "arbitrary intrusion. . .into the security of plaintiffs' privacy" and their search without probable cause. The complaint also alleged that the city and county maintained "an official policy and custom of permitting the occurrence of the types of wrongs set forth hereinabove and hereafter," including failing properly to train officers, encouraging arrests without probable cause, procuring unlawful search warrants, and failing to investigate police misconduct, in violation of *Monell v. Department of Social Serv.*, 436 U.S. 658 (1978). The complaint asked for general and special damages, pain and suffering, punitive damages, and attorney fees. The city answered, asserting qualified immunity on behalf of the individual defendants, among other affirmative defenses.

The parties filed cross-motions for summary judgment in March 1994. The district court ordered defendants to file supplemental briefs regarding the procedure for obtaining release of seized monies. At

about the same time, the city filed a motion for the return of the property.

On May 12, 1994, the district court granted summary judgment for the city on the Perkins' *Monell* claim, and for all defendants on the claim that the warrant lacked probable cause. The court postponed a ruling on the qualified immunity of the individual officers.

The court also postponed a ruling on a claim against the city for failing to return the Perkins' seized property. Finding that "the City had a procedure for the return of unlawfully seized property; plaintiff needed only to obtain a court order. But, the City's procedure for the return of unlawfully seized property may be entirely inadequate in practice--plaintiff claims he could not obtain the court order," the district court suggested that these facts might be the basis of a due process claim not raised in the complaint, and asked for further briefing.

Trial was scheduled for June 14. The city returned the property (with the exception of the starter pistol, which had been reported stolen) on June 24, 1994, more than a year after it was seized.

On July 8, the district court granted summary judgment on all remaining claims in favor of the city and the detectives. (The county and Lieutenant Schimanski had been dismissed.) The order did not address the question whether the city's notice and procedure for recovery of seized property violated due process.

Perkins appealed. After oral argument, we remanded to the district court for determination of the due process issue. After supplemental briefing, the district court granted summary judgment for the city, holding that Perkins had waived his due process challenge to the city's procedures by failing to invoke a state statute providing for the return of improperly seized property, and that Perkins received adequate notice.

DISCUSSION

I. *Qualified immunity*

> A law enforcement officer is entitled to qualified immunity in a § 1983 action if the district court determines that, in light of clearly established principles governing the conduct in question at the time of the challenged conduct, the officer could reasonably have believed that the conduct was lawful. . . . First, the district court must determine whether the law governing the official's conduct was clearly established at the time the challenged conduct occurred. The second step then asks whether, under that clearly established law, a reasonable officer could have believed the conduct was lawful.

[1] *Mendoza v. Block*, 27 F.3d 1357, 1360 (9th Cir. 1994) (as amended) (citations omitted). The plaintiff bears the burden of showing that the right allegedly violated was clearly established at the time of the alleged misconduct. *Romero v. Kitsap County*, 931 F.2d 624, 627 (9th Cir. 1991). "[T]he law in question must be sufficiently clear that the unlawfulness of the action

would have been apparent to a reasonable official." *Chew v. Gates*, 27 F.3d 1432, 1447 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1097 (1995). This court reviews de novo the district court's decision on qualified immunity. *Elder v. Holloway*, 114 S. Ct. 1019, 1023 (1994).

[2] Perkins claims that the officers who searched his home acted unreasonably in seizing the currency and the starter pistol because neither was mentioned in the warrant, claiming "The general rule . . . is: if something is not described in the warrant, it cannot be seized." This is not an accurate statement of clearly established law at the time of the search. Instead, it was clearly established in 1993 that during a search, officers may seize an item not described in the warrant if they are in a lawful position to view the item, the item reasonably appears to be contraband, and the discovery of the item is inadvertent. *United States v. Washington*, 797 F.2d 1461, 1468 (9th Cir. 1986) (as amended). This "plain view" doctrine applies to the seizure of an item not listed in the warrant. *Arizona v. Hicks*, 480 U.S. 321, 326 (1987).

[3] Perkins does not seriously dispute that the "plain view" rule was clearly established at the time of the search. He implies, however, that the officers were not in a "lawful position" because they were in the southwest bedroom, which Perkins asserts was his and Clara Perkins' room. Yet the officers stated that they did not now whose room was whose when they entered the house, and the warrant authorized them to search all rooms. Perkins does not suggest that the discovery of the cash and pistol was other than inadvertent.

[4] Perkins also argues that, in light of clearly established law, the items "did not reasonably appear to be contraband." At the time of the search, it was clearly established that for a "plain view" seizure to be lawful, the officer must have probable cause to believe there is a nexus between the seized items and criminal activity. *Washington*, 797 F.2d at 1469. The criminal activity need not be that described in the warrant. *Id.* at 1468 (under search warrant related to drugs, permissible to seize items in plain view which reasonably appear to be related to prostitution).

A. *The cash*

The officers found the cash in the bedroom closet where they were searching for weapons and the other items listed in the warrant. Detective Ferrari stated that because he knew that Marsh lived part time at McDuffy's residence and the search there had uncovered gang photos, cash, and drugs, and because ammunition was found at Perkins' home as well, it seemed likely that the cash was evidence of criminal activity, perhaps drug trafficking. He also noted that because Perkins' house was humble, the presence of a large amount of cash was less consistent with noncriminal behavior. Detective Melnyk testified that his experience also led him to believe the cash was evidence of illegal activity.

[5] A large amount of cash may be evidence of intent to possess or distribute drugs. Several circuits had so held before the search in this case. *See, e.g., United States v. Garcia*, 983 F.2d 1160, 1165 (1st Cir. 1993) ($1,308); *United States v. Slater*, 971 F.2d 626, 637 (10th Cir. 1992) ($2,400). This circuit followed suit shortly after. *United States v. Soyland*, 3 F.3d 1312,

1315 (9th Cir. 1993)($4,600), *cert. dismissed*, 115 S. Ct. 32 (1994). Perkins cites, and we have found, no authority to the contrary. We conclude that the law was clearly established that large amounts of cash may be evidence of drug activity. We now consider whether the officers acted reasonably in the light of that rule.

[6] In each of the cases cited above drugs were also discovered. In this case the officers found no drugs in Perkins' home. Nevertheless, they had other reasons to connect the money to illegal activity: The discovery of drugs and cash at McDuffy's house, Marsh's relationship with McDuffy, Marsh's gang record, and the relatively large amount of cash relative to the Perkins family's apparent financial situation. Although--as was the case here--a large bundle of cash may turn out to be innocently earned, that does not mean that the detectives could not reasonably believe otherwise.

We hold that, in light of the law clearly established at the time of the search, the detectives could reasonably believe their seizure of a large amount of cash was lawful.

B. *The starter pistol*

It was clearly established in 1993, at the time of the search of Perkins' home, that a starter pistol is not automatically a firearm or deadly weapon. In *United States v. Dishman*, 486 F.2d 727 (9th Cir. 1973), this circuit held that carrying a starter pistol that would require retooling to convert it into an operating weapon likely to cause great bodily harm was not carrying a "deadly or dangerous weapon" per se, as described in air safety law. *Id.* at 732. We added, however, that "[o]f

course, the situation would be different if use were made of a starter pistol on an airplane." *Id.* Under those circumstances, its "use" might convert it into a dangerous weapon. *Id.* at 731-32.

The officers in this case do not claim that this particular starter pistol was a deadly weapon. Instead, an officer present at the search (but not individually named) submitted an affidavit stating that gang members sometimes brandish starter pistols during the commission of crimes, then claim that they had not intention to harm.

[7] Perkins cites no authority clearly establishing that a starter pistol could never be a firearm. Even considering that some starter pistols would not fall into that classification, it is reasonable to seize a starter pistol in plain view when an officer has a reason to believe that it has been or could be used in criminal or gang activity to frighten a victim. *See, e.g., United States v. Dzielinski*, 914 F.2d 98, 102 (7th Cir. 1990) (display of starter pistol during bank robbery justified upward departure at sentencing for apparent possession of dangerous weapon).

We affirm the district court's finding of qualified immunity.

II. *The due process claim against the city*

[8] In order to succeed in the claim against the city, Perkins must show "that the [c]ity adhered to a 'policy, practice or custom' that caused [him] to be deprived of [his] constitutional rights." *Pierce v. Multnomah County*, 76 F.3d 1032, 1039 (9th Cir.) (citing *Monell*), *cert. denied*, 117 S. Ct. 506 (1996).

[9] Although Perkins alleged in the complaint that West Covina had an official policy of permitting such wrongs as the execution of searches using unlawful warrants, he neither alleged nor produced facts in support of this claim. On appeal, he claims that the city policy that violated his constitutional rights was the failure to provide a reasonable procedure for the recovery of property seized pursuant to a search warrant, or alternatively, the failure to provide him with adequate notice of the procedure for recovery of the seized property. The city does not dispute that the procedure for obtaining the release of property and the practice of leaving a form written notice at a search site constitute city policy for which it is responsible under *Monell*.

We review de novo the district court's grant of summary judgment on the due process claim. *United States v. $874,938.00 U.S. Currency*, 999 F.2d 1323, 1325 (9th Cir. 1993) (per curiam).

A. *Procedure for return*

[10] The Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of . . . property, without due process of law." "The Fourteenth Amendment places procedural constraints on the actions of government that work a deprivation of interests enjoying the status of 'property' within the meaning of the Due Process Clause." *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978). Those procedural constraints require that the property's owner "be given notice and an 'opportunity to be heard at a meaningful time and in a meaningful manner.'" *Schneider v. County of San Diego*, 28 F.3d 89, 92 (9th Cir. 1994) (as amended) (quoting *Brock v.*

Roadway Express, Inc., 481 U.S. 252, 261 (1987)), *cert. denied*, 115 S. Ct. 1112 (1995). Although Perkins regained his property more than a year later, even "a temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment." *Fuentes v. Shevin*, 407 U.S. 67, 85 (1972).

[11] Procedural due process generally requires a hearing prior to deprivation, but a limited number of "extraordinary situations" justify postponing notice and the opportunity for a hearing until after the seizure of the property. *Id.* at 90-91. Those situations involve seizures that are necessary to an important public interest; present a special need for prompt action; and utilize legitimate force which the government strictly controls. *Id.* at 91. There is thus no requirement of a prior hearing before a seizure of possessions under a search warrant:

> First, a search is generally issued to serve a highly important governmental need--e.g., the apprehension and conviction of criminals--rather than the mere; private advantage of a private party in an economic transaction. Second, a search warrant is generally issued in situations demanding prompt action. The danger is all too obvious that a criminal will destroy or hide evidence of fruits of his crime if given any prior notice. Third, the Fourth Amendment guarantees that the State will not issue search warrants merely upon the conclusory application of a private party. It guarantees that the State will not abdicate control over the issuance of warrants and that no warrant will be issued without a prior showing of probable cause.

Id. at 93-94 n.30. In such situations,

> either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking . . . satisf[ies] the requirements of procedural due process.

Parratt v. Taylor, 451 U.S. 527, 539 (1981).

The city claims that the California Penal Code affords adequate post-deprivation process. Section 1536 of the Code provides:

> [A]ll property or things taken on a warrant must be retained by the officer in his custody, subject to the order of the court to which he is required to return the proceedings before him, or of any other court in which the offense in respect to which the property or things taken is triable.

[12] "Case law clearly establishes that both during and after the pendency of a criminal action, section 1536 empowers the court to entertain a summary proceeding by 'nonstatutory' motion, for the release of property seized under a search warrant." *People v. Icenogle*, 210 Cal. Rptr. 575, 577 (Ct. App. 1985). (In this case, the

motion filed by the city to obtain the release of Perkins' property was such a "nonstatutory" motion, citing § 1536.) Officers seizing property do so on behalf of the court for use in a judicial proceeding, and they must respond to court orders to release the property. *Id.* The officers have no right in the property or in its possession, and have no authority over it except as the court may order. *Oziel v. Superior Court*, 273 Cal. Rptr. 196, 201-02 (Ct. App. 1990).

[13] Perkins argues that a "nonstatutory" motion under § 1536 was not an adequate remedy. He claims his money could not have been released, because it was never introduced into evidence in a criminal case. The court has control over seized property, however, even when as in this case, the property is never used in the underlying criminal proceedings: "'[E]ven as to property not yet offered or received in evidence . . . judicial control still exists.'" *Id.* (quoting *Gershenhorn v. Superior Court*, 38 Cal. Rptr. 576, 579 (Ct. App. 1964)).

[14] California Penal Code § 1540 provides:

> PROPERTY, WHEN TO BE RESTORED FROM PERSON FROM WHOM IT WAS TAKEN. If it appears that the property taken is not the same as that described in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the magistrate must cause it to be restored to the person from whom it was taken.

Because one may secure a determination whether the property should be returned "immediately after the seizure . . . under section[] . . . 1540 of the Penal Code," this and other remedies such as mandamus "satisfy the requirements of due process. . . . The purpose of section[] 1540 is to provide one whose property is seized with a speedy remedy in a readily accessible court." *Aday v. Superior Court*, 362 P.2d 47, 53-54 (Cal. 1961). A motion to return is "expressly authorized" under the statute, *Gershenhorn*, 38 Cal. Rptr. at 578, and "[t]he determination may be had in advance of the trial of the criminal action which ordinarily follows the seizure." *People v. Bonanza Printing Co.*, 76 Cal. Rptr. 379, 381 (Ct. App. 1969). This motion is separate from a "nonstatutory" motion under § 1536. *Buker v. Superior Court*, 102 Cal. Rptr. 494, 497 (Ct. App. 1972).

[15] Perkins thus had available to him postdeprivation procedure for the return of his property--a "nonstatutory" motion under § 1536, and a § 1540 motion. We agree with the California Supreme Court that "[t]hese various remedies satisfy the requirements of due process." *Aday*, 362 P.2d at 54.

B. *Notice*

[16] Due process notice "must be of such nature as reasonably to convey the required information." *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950). The "notice" left at Perkins' home simply informed him that his home had been searched by the West Covina police department, with the date of the search warrant and the issuing judge and court, the date of the search, a list of the property seized, and the names

and telephone numbers of several officers of the police department to contact for "more information." The issue is whether due process required more: that the police notify Perkins of the availability of a judicial remedy should he wish to claim his property, and provide some guidance for invoking that remedy.

The Supreme Court faced a similar issue in *Memphis Light*. The plaintiffs, who were subject to multiple billing by the utility company, were unable to clear up the disputed charges despite visits to the company's offices, and their gas and electric service was terminated several times. The company had a procedure for the resolution of disputed bills, 436 U.S. at 6 n.4, but the notice of termination sent to the plaintiffs simply stated that payment was overdue and service would be cut off by a certain date; "No mention was made of a procedure for the disposition of a disputed claim." *Id.* at 13. The Court held that the notice was insufficient to satisfy due process:

> [The] notification procedure, while adequate to apprise the [plaintiffs] of the threat of termination of service, was not "reasonably calculated" to inform them of the availability of "an opportunity to present their objections" to their bills. *Mullane v. Central Hanover Trust Co.*, *supra*, at 314. The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending "hearing." Notice in a case of this kind does not comport with constitutional requirements when it does not advise the

> customer of the availability of a procedure for protesting a proposed termination of utility service as unjustified. As no such notice was given respondents--despite "good faith efforts" on their part--they were deprived of the notice which was their due.

Memphis Light, 435 U.S. at 14-15 (footnotes omitted).

[17] Here, the notice left at Perkins' home did not mention the availability of any procedure for protesting the seizure of his property, let alone the existence of a formal judicial procedure for obtaining return. It did not provide essential information necessary to invoke that procedure: the search warrant number, the method for obtaining the number from the municipal court (such as the need to furnish the court with the address searched), or the necessity for a written request for return of the property. The notice was "skeletal," like the notice that the *Memphis Lights* court found unconstitutional. *Id.* at 15 n.15.

The city charges Perkins with the responsibility for his own confusion. It cites his failure to persist and to unearth the proper remedy and the method of its invocation. But Perkins, like the *Memphis Light* plaintiffs, made a number of telephone calls and at least two trips to the city's police station, one with his daughter, and a trip to the municipal court. While the police told him he needed a "court order," there is no evidence that they explained how to go about getting the correct warrant number, or pointed out the need for a written request. Perkin's efforts, though unavailing, were "good faith" efforts in light of the sketchy written

notice and the confusing and inaccurate information he received on his calls and visits. *See id.* at 17 n.19 (plaintiff's trips to utility office and some explanation by employees does not undermine holding that notice was inadequate); *Schneider*, 28 F.3d at 93 (notice citing incorrect statute number violated due process). Nor is it any answer that the city eventually released the property. It did so on its own motion, and only long after Perkins had filed this suit. A delayed response to a lawsuit after a plaintiff has resorted to litigation under 42 U.S.C. § 1983 is not evidence that due process was afforded.

"[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrisey v. Brewer*, 408 U.S. 471, 481 (1972). Seizure of property pursuant to a search warrant occurs "to thousands of [people] of various levels of education, experience, and resources" who should be clearly informed of the procedure for retrieving their property if it is not needed for the criminal proceedings. *See Memphis Light*, 436 U.S. at 15 n.15. People who are not suspected of criminal activity and whose property is seized are in particular need of detailed notice. As in this case, they may be uninvolved in the alleged criminal activity pursuant to which the government has seized their property without a predeprivation hearing. The "situation demands" written notice of how to retrieve the property. *See Aguchak v. Montgomery Ward Co.*, 520 P.2d 1352 1357 (Alaska 1974) (due process requires that written notice to legally unsophisticated and indigent defendants be more substantial, detailed, and easily understood). We find the written notice given by the West Covina Police Department was constitutionally inadequate.

[18] The dissent concedes that "in circumstances requiring a predeprivation hearing, notice of such a hearing or process is necessary." *See Parratt*, 451 U.S. at 538 (where established procedures under state law authorize deprivation of property, due process requires predeprivation notice and hearing). Nevertheless, the dissent argues that when the state may take property without predeprivation notice or hearing, due process does not require *any* notice of the procedures for the return of the property. But surely when there is no opportunity for predeprivation notice for hearing, the necessity of adequate postdeprivation notice of the means of securing the return of property is at least as compelling.

The remaining issue is what notice was due in this case. To identify the specific dictates of due process, we must consider (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of such an interest through the procedures used, and the value of additional safeguards; and (3) the government's interest, "including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

The private interest in this case is in the possession and use of personal property, surely a significant interest. The risk of erroneous deprivation, especially in the emergency situations often underlying search warrants, is substantial. By contrast, the administrative and fiscal burden of providing adequate written notice is slight. The city already leaves a standard form of "notice" at the premises searched. The only burden involved is the formulation of

constitutionally adequate wording by including the relevant information on the notice.

[19] It is not our function to specify the exact phrasing of an adequate notice. In cases where property is taken under California law, however, the notice should include the following: as on the present notice, the fact of the search, its date, and the searching agency; the date of the warrant, the issuing judge, and the court in which he or she serves; and the persons to be contacted for further information. In addition, the notice must inform the recipient of the procedure for contesting the seizure or retention of the property taken, along with any additional information required for initiating that procedure in the appropriate court. In circumstances such as those presented by this record, the notice must include the search warrant number or, if it is not available or the record is sealed, the means of identifying the court file. It also must explain the need for a written motion or request to the court stating why the property should be returned.

The detailed implementation of these general requirements is left to the appropriate government agency. All that is necessary is that the notice be reasonably calculated to inform people of the means by which they may be able to secure the prompt return of their seized property.

III. *Perkins' right to trial*

Perkins argues that summary judgment violates his right to trial. This issue is frivolous. Summary adjudication of a case with no material issues of fact does not deprive a party of the right to trial. *See, e.g., Pease*

v. Rathbun-Jones Engineering Co., 243 U.S. 273, 278 (1917). Summary Judgment is an integral part of the federal rules, which are designed to ensure the just, speedy, and inexpensive determination of every issue. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quotations omitted). Because it determines only questions of law, summary judgment does not deprive the nonmoving party of its right to a jury trial. *See Itel Capital Corp. v. Cups Coal Co.*, 707 F.2d 1253, 1261 (11th Cir. 1983).

CONCLUSION

We affirm in part and reverse in part. We affirm the district court's grant of summary judgment to the individual defendants on the grounds of qualified immunity. Because we find the notice given Perkins did not meet the requirements of due process, we reverse the summary judgment in favor of the city and remand to the district court for the grant of summary judgment to Perkins on this issue, and for such further proceedings as may be necessary. Each party shall bear their own costs.

LEAVY, Circuit Judge, concurring in part and dissenting in part:

I concur in all of Judge Boochever's opinion except section II.B. I dissent from that section because I do not believe that due process requires "that the police notify Perkins of the availability of a judicial remedy should he wish to claim his property, and provide some guidance for invoking that remedy." By imposing a duty on the police officers to advise Perkins on matters of

state law, the opinion adds a due process requirement that has support neither in the case law nor in the Due Process Clause.

I would agree that in circumstances requiring a predeprivation hearing, notice of such a hearing or process is necessary. The Supreme Court's standard of "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action," *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), has been developed and applied in the context of *predeprivation* procedures. *See e.g., Mullane*, (publication notice of proceeding to settle trust funds accounts found to be inadequate); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978) (notice of dispute resolution procedures prior to terminating utility service held to be inadequate); *Greene v. Lindsey*, 456 U.S. 444 (1982) (posted notice of eviction found to be constitutionally inadequate); *Schneider v. County of San Diego*, 28 F.3d 89 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 1112 (1995) (due process violation where seizure notice did not state that abandoned vehicles would be destroyed). These requirements are inapplicable where, as here, Perkins' property was rightfully seized pursuant to a search warrant without need for a predeprivation proceeding.

Because Perkins' property was lawfully seized, due process requires "the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking." *Parratt v. Taylor*, 451 U.S. 527, 539 (1981). The majority concede that the postdeprivation procedures provided under California law "satisfy the requirements of due process . . . and conform with the requirements laid

down by the Supreme Court of the United States." Perkins' property was rightfully seized and held by the police, and California law provides a means for him to obtain return of his property. I cannot agree that due process requires the City of West Covina to advise Perkins of his remedies.

As the majority points out, Perkins brought this action in November 1993. In June 1994, Perkins' property was returned upon motion of the city. Surely the majority does not intend to allow recovery for deprivation of Perkins' property while he and his lawyer failed to seek its return. The Due Process Clause does not require the City of West Covina to provide legal advice to Perkins or any other person with a claim against the city.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED
May 10, 1994
Clerk, U.S. District Court
Central District of California
By Deputy

ENTERED
May 9, 1994
Clerk, U.S. District Court
Central District of California
By Deputy

LAWRENCE PERKINS, et al.
Plaintiffs,

v.
THE CITY OF WEST COVINA, et al.
Defendants.

CV 93-7084 SVW (CTx)

ORDER

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Introduction

Presently before the Court is a civil rights action stemming from an allegedly unlawful search and seizure

in violation of plaintiffs' Fourth Amendment rights. The parties have filed cross motions for summary judgment.

Statement of Facts

Lawrence Perkins, Clara Perkins and April Perkins ("plaintiffs") reside at 531 Balham Street in West Covina. On May 21, 1993, their home was searched by police officers of the City of West Covina (the "City"). Among the officers present at the search were defendants Detective Ferrari, Detective Melnyk, Lieutenant Schimanski, Detective Aldecoa and Detective O'Brien (the "individual defendants").

On May 18, 1993, an individual named Julio Alberto Clark had been shot to death at the residence of Lashaun McDuffy. The police searched McDuffy's residence. They found evidence linking McDuffy's boyfriend Marcus Marsh (a.k.a. Marcus Winter) to the murder. They also found a vial of cocaine and $994.00 in cash.

McDuffy provided the police with Marsh's telephone number. This number was traced to plaintiffs' address, where Marsh had been boarding. On May 20, 1993, the Honorable Dan Thomas Oki signed a search warrant ordering the search of plaintiffs' house. The warrant authorized a search for "any evidence of street gang activity" as well as "[a]ny evidence of firearms of the following caliber: 9mm."

During the search, the police confiscated suspected gang clothing, paperwork belonging to Marsh and an address book belonging to Mr. Perkins. Furthermore, the police seized several guns and various types of ammunition. The parties dispute whether the police seized a pager as well.

After the search, the house was left in disarray. Several items were destroyed, including a clock radio, a flight bag, a smoke detector, a pair of binoculars, a

swimming pool and a waterbed cabinet. The officers confiscated $2,469.00 in cash and a starter pistol.

Several days later, Mr. Perkins contacted Detective Ferrari seeking return of the confiscated cash. According to Mr. Perkins, Detective Ferrari told Mr. Perkins that the cash would only be released if Mr. Perkins implicated Marsh. After Mr. Perkins refused to comply, Detective Ferrari stated that the cash could only be released with a court order. Detective Ferrari denies he told Mr. Perkins that he would release the cash if Mr. Perkins implicated Marsh. He does admit, however, that he told Mr. Perkins to obtain a court order.

Mr. Perkins attempted to obtain the order, but was informed that he could not do so without the number of the search warrant or, in the alternative, a case number for the case against Marsh. The warrant number could not be obtained because the warrant was sealed and no file number had been assigned, and there was no case number in the case against Marsh because charges had not been filed. Approximately one year later, the City returned the cash to Mr. Perkins.

Discussion

City of West Covina

Unlawful Search and Seizure

As a general rule, a municipality is not liable under 42 U.S.C. § 1983 on the basis of respondeat superior. Instead, the municipality will only be held liable if plaintiff shows that the violation resulted from an unconstitutional policy, practice or custom. See Monell v. Department of Social Serv., 98 S.Ct. 2018 (1978); accord St. Louis v. Praprotnik, 108 S.Ct. 915, 926 (1988). In order to prevail, plaintiff need not produce evidence of a written policy. Instead, plaintiff may produce evidence of a long and frequent pattern of constitutional deprivations, or, plaintiff may prove that

the unconstitutional action was taken by an individual with policy making authority. Monell, 98 S. Ct. at 2036. Furthermore, a custom or practice may be inferred where governmental officials act in deliberate indifference in refusing to sanction an employee for engaging in unconstitutional conduct. McRorie v. Shimoda, 795 F.2d 780 (9th Cir. 1986) (where plaintiff alleged that he was deprived of his liberty rights by prison guards, the appellate court overruled the dismissal of prison wardens as defendants, finding that plaintiff should have the opportunity to amend his complaint to state that wardens were aware of and were deliberately indifferent to the violations); accord Thompson v. City of Los Angeles, 885 F.2d 1439 (9th Cir. 1989).

In the present case, plaintiff has offered no evidence that unreasonable searches are condoned by the City of West Covina. Nor has plaintiff produced evidence of a pattern of unreasonable searches. Finally, plaintiff has failed to offer evidence that the City policy-making officials were aware of, but were deliberately indifferent, to the officers' conduct.

Accordingly, the Court must GRANT the City's motion for summary adjudication insofar as it seeks to state a claim against the City for the police officers' search of plaintiffs' residence.

Failure to Release Seized Property

Plaintiffs' claim against the City for failure to return his property after the City discovered that it was wrongfully seized presents a more difficult question. The Court postpones ruling on this issue pending further briefing by the parties.

Immediately after the seizure of the cash, Mr. Perkins sought to get it back. No City official objected to the return; in fact, Detective Ferrari instructed Mr. Perkins to obtain a court order. But, when Mr. Perkins

tried to obtain the court order, he was told that he needed a search warrant number or a case number. Because the warrant had been sealed, he claims he could not obtain the warrant number; because no charges had been filed against Marsh, there was no case number. In other words, although no one openly objected to the return of Mr. Perkin's money, and although the City had a "procedure" which Mr. Perkins could follow to get it back, Mr. Perkins could not follow the procedure.

As the undisputed facts currently stand, it seems unlikely that there is a Monell claim against the City for the unlawful seizure of the property. As discussed above, the City may only be held liable for the seizure if plaintiff proves that the City has a custom or policy of permitting such seizures, or that the officials were deliberately indifferent in failing to sanction the individuals responsible for the unlawful seizure. Plaintiff has presented no evidence which would establish such a practice. In fact, the evidence establishes that the City of West Covina has an established procedure to remedy unlawful seizures -- plaintiff may obtain a Court order upon a showing that the property was seized without probable cause.[1]

---

[1] Although plaintiffs' theory of Monell liability is difficult to understand, plaintiff may be arguing that the City's failure to return plaintiffs' property amounted to a ratification of the unlawful seizure. If this is plaintiffs' theory, the Court finds it dubious, for it shows nothing more than an inefficient bureaucratic process. The mere failure to timely return property seized without probable cause is not tantamount to a policy which encourages such seizure; and accordingly should not make the City responsible for the officers' Fourth Amendment

On the other hand, the Court does find that the facts, as currently presented by plaintiff, may form the basis of a Due Process challenge, a cause of action not currently raised by plaintiff's complaint. The evidence shows that the City had a procedure for the return of unlawfully seized property; plaintiff needed only to obtain a court order. But, the City's procedure for the return of unlawfully seized property may be entirely inadequate in practice -- plaintiff claims he could not obtain the court order. The failure of a government body to provide adequate procedures for the return of unlawfully seized property may amount to a violation of plaintiffs' right to Procedural Due Process.[2] See e.g.

---

violations.

However, if this is plaintiffs' theory, and plaintiffs have authority which supports the use of such a theory in establishing liability under Monell, plaintiffs should bring this to the Court's attention in further briefing.

[2] Notwithstanding the seal of the warrant, it would seem that a procedure should exist for obtaining the warrant number. If such a procedure existed and made available to plaintiff, and plaintiff simply failed to take advantage of it, then it would seem inappropriate for plaintiff to now claim that his right to procedural due process has been violated.

The parties should discuss the existence of such a procedure, and whether plaintiff could have followed such a procedure to obtain the return of his cash. The Court is aware that defendant has filed the supplemental affidavit of Detective Ferrari in which Detective Ferrari states that "to my knowledge" plaintiff could have

Matthews v. Eldridge, 424 U.S. 319 (1976); Hudson v. Palmer, 104 S.Ct. 3194, 3204 (1984) (finding that intentional deprivation of prisoners property did not amount to deprivation of due process rights where there was meaningful post-deprivation remedy).

In light of these observations, the parties should submit further briefs addressing the following issues:

(1) If plaintiffs intend to argue that the City is liable for the officer's Fourth Amendment violations on a Monell theory, plaintiff should further explain its basis for arguing that the City has a policy or custom of endorsing unlawful seizures. The parties should address the following questions: What evidence establishes that policy-making officials endorsed, ratified or were deliberately indifferent to the allegedly unlaw seizure? How can it be argued that the City's policy regarding the return of seized property amounts to a custom or practice of encouraging unlawful seizure of property?

(2) If plaintiffs intend to amend the complaint to include a Procedural Due Process challenge, plaintiff should discuss whether, in the present circumstances, the City's policy for the return of seized property complied with the requirements of the Due Process Clause. The parties should address the following questions: In the present circumstances, how could plaintiffs' have obtained timely return of their property? Did plaintiffs have any means of discovering the proper means of obtaining the timely return of their property? In light of precedent, what procedure is mandated by the Due Process Clause for ensuring the timely return of unlawfully seized property?

---

obtained the number from the Court Clerk. This statement is without adequate foundation.

Individual Defendants

Search Without Probable Cause/Knock Notice

The Court finds that, as a matter of law, the magistrate had probable cause to issue the warrant for the search of plaintiffs house. Furthermore, plaintiff has produced no evidence that the officers failed to comply with the knock-notice requirements.

Accordingly, the Court GRANTS defendants motion for summary adjudication insofar as plaintiff stated a claim for search without probable cause and failure to comply with the knock notice requirements.

Unlawful Search

Plaintiffs have produced evidence that, in searching plaintiffs' residence, the individual defendants destroyed numerous items including a clock radio, a flight bag, a smoke detector, a pair of binoculars, a swimming pool and a waterbed cabinet. Plaintiff has also produced receipts establishing that replacement of the property would cost several hundred dollars.

The individual defendants, searched the residence for guns and gang paraphernalia, have failed to offer any explanation as to why destruction of plaintiffs' property was reasonable. Instead, defendants argue that the destruction was *de minimis*, and that, even if it were substantial, it cannot be the basis of a constitutional violation because it was, at worst, due to the negligence of the officers. Both arguments are spurious.

Defendants have failed to cited any Ninth Circuit precedent for the proposition that there is a *de minimis* exception to the Fourth Amendment. Instead, defendants have pointed to a case from the District of Alabama which states that "unreasonable conduct in some instances may not be actionable . . . where injury is too minor . . ." Williams v. Alford, 647 F.Supp. 1386, 1390 n. 3 (M.D. Ala. 1986). The holding of Williams,

which involved a finding following a court trial rather than a summary judgment, is inapposite to the present case. Plaintiff claimed that the officers had unreasonably destroyed his property. The court, weighing the evidence presented by plaintiff, found that he failed to meet his burden of proof because he produced no evidence of property damage other than "conclussory allegations." The Court expressly found:

> Based upon the evidence, this Court finds that this particular search was not unreasonable in light of the fact that officers acted pursuant to a warrant, no personal property was destroyed, and the door to plaintiff's house was repaired.

Id. 1389 (emphasis added). In the present case, plaintiff has produced more than a "mere allegation" of damage to personal property. He has presented photographs as well as receipts establishing significant damage. A trier of fact may choose to reject that evidence, but the Court cannot do so at this stage of the proceedings.

In short, reasonable trier of fact could conclude that the destruction of plaintiffs' property was intentional, significant and entirely unrelated to the officers' search objectives. Accordingly, summary judgment is DENIED.

Unlawful Seizure

Both parties have moved for summary judgment in regards to the seizure of the cash and the starter pistol.

Defendants argue that the seizure was legal under the plain view doctrine: not only did they have lawful access to the cash, but they had probable cause to believe that it was evidence of drug dealing. At the very least, defendants argue, they should be granted qualified immunity. Plaintiffs, on the other hand, argue that no

reasonable officer could believe that he had probable cause to seize the cash.

The Court disagrees with both positions. Several cases have upheld the seizure of cash as evidence of drug dealing. See e.g., U.S. v. Garcia 983 F.2d 1160 (1st Cir. 1993); U.S. v. Vargas, 945 F.2d 426 (1st Cir. 1991); U.S. v. Cooper, 942 F.2d 1200 (7th Cir. 1991); U.S. v. Gordils, 982 F.2d 64 (2nd Cir. 1992). However, all of these cases involved far greater sums of money than the present case. More importantly, in all of these the officers performing the search had discovered drugs at the premises searched along with the cash.

In support of defendants' argument for qualified immunity, defendants add several facts which, defendants argue, establish that a reasonable officer could have believed that there was probable cause to seize the cash. See Act UP!/Portland v. Bagley, 988 F.2d 868 (9th Cir. 1993). Specifically, defendants claim that they found evidence of drug dealing at McDuffy's residence prior to the search of plaintiff's residence and that they found pagers and guns at plaintiffs residence

The Court cannot rely on these additional facts for several reasons. First, only very small amount of drugs was seized at the McDuffy residence; and defendants have presented no evidence which links this finding to Marsh.[3] Second, plaintiffs dispute the fact that pagers were seized at their residence. Third, plaintiffs argue that the layout of their house was such that a reasonable officer searching the house would have

---

[3] Importantly, the search warrant was obtained after the search of the McDuffy residence. It was written in very broad terms, but had no mention of drugs whatsoever.

known that the cash belonged to them and had no connection with Marsh.

The Court therefore postpones a ruling of qualified immunity pending jury resolution of the foregoing factual issues. Both plaintiffs' and defendants' motions for summary adjudication are hereby DENIED insofar as they apply to the allegedly unlawful seizure of plaintiffs' cash.

Conclusion

The City of West Covina's motion for summary adjudication is GRANTED insofar as plaintiffs have stated a claim against the City for the unlawful search of plaintiffs' residence. The Court declines to presently rule on the City's motion insofar as plaintiff has stated a claim for failure to return illegally seized property. The parties should submit further briefs by May 23, 1994.

The individual defendants' motion for summary adjudication is GRANTED insofar as plaintiffs have stated a claim for search without probable cause and failure to comply with the knock-notice requirement. The individual defendants' motion for summary judgment is DENIED insofar as plaintiffs have stated a claim for unreasonable search and seizure.

Plaintiffs' motion for summary judgment is DENIED.

IT IS SO ORDERED.

DATED: May 9, 1994

/s/ Stephen V. Wilson
STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED
August 3 1994
Clerk, U.S. District Court
Central District of California
By Deputy

ENTERED
August 4, 1994
Clerk, U.S. District Court
Central District of California
By Deputy

LAWRENCE PERKINS, et al.
Plaintiffs,

v.

THE CITY OF WEST COVINA, et al.
Defendants.

CV 93-7084 SVW (CTx)

JUDGMENT

1. Based upon the ~~special~~/s/svw verdict of the jury, dated June 28, 1994, it is hereby ORDERED, ADJUDGED, and DECREED that **JUDGMENT BE ENTERED** in favor of defendants Nalian, Heieck, Aldecoa, and O'Brien on all claims.

2. Claims against the City of West Covina, seeking to impose 42 USC § 1983 liability based upon Monell v. Department of Social Services, 436 U.S. 658 (1978) were dismissed pursuant to this Court's Order dated July 1, 1994.

3. Claims against all other individual defendants, including Ferreri, Melnyk, and Schimanski, were dismissed during trial, with prejudice.

IT IS SO ORDERED.

DATED: August 2, 1994

/s/ Stephen V. Wilson
STEPHEN V. WILSON
JUDGE OF THE U.S. DISTRICT COURT

Prepared by:
Jeff Giordano
FRANSCELL, STRICKLAND, ROBERTS & LAWRENCE
Attorneys for Defendants
CITY OF WEST COVINA, DETECTIVE MICHAEL FERRARI, DETECTIVE DAVID MELNYK, DETECTIVE DAN NALIAN, DETECTIVE DARIO ALDECOA, DETECTIVE JAMES O'BRIEN, DETECTIVE WAYNE HEIECK and LT. JOHN SCHIMANSKI

APPENDIX D

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
April 30, 1996
U.S. Court of Appeals
By Cathy A. Catterson, Clerk

LAWRENCE PERKINS; CLARA PERKINS; APRIL PERKINS, a minor, by and through her Guardian ad Litem, Lawrence Perkins,
Plaintiffs-Appellants,

v.

THE CITY OF WEST COVINA, et al.
Defendants-Appellants.

No. 94-56365

DC No. CV93-7084 SVW

ORDER

Before: CANBY, BOOCHEVER, and LEAVY, Circuit Judges.

At the district court's suggestion, Perkins filed supplemental briefing dated May 23, 1994, regarding his claim that the city of West Covina violated 42 U.S.C. §

1983 and due process by failing to provide a reasonable procedure for the recovery of property seized pursuant to a search warrant. Defendants also filed supplemental briefs on the issue. On June 9, Perkins filed an ex parte motion to shorten time for hearing a motion to amend his complaint to include the due process issue, or, in the alternative, to include it in the pre-trial order. Defendants filed an opposition.

On June 22, 1994, the first day of trial, the district court ruled "the Due Process issue is bifurcated and not part of this phase of trial." The court's later order, dated July 1, 1994, and filed July 6, 1994, granted West Covina's motion for summary judgment on Perkins' § 1983 claim that the city condoned unlawful seizures of property. The court did not address, however, the procedural due process claim. The final judgment states that "Claims against the City of West Covina, seeking to impose 42 U.S.C. § 1983 liability based upon Monell v. Department of Social Services, 436 U.S. 658 (1978) were dismissed pursuant to this Court's order dated July 1, 1994."

We therefore remand to the district court for sixty (60) days for clarification of the status of the bifurcated claim that West Covina violated due process by failing to provide adequate post-deprivation procedure for the recovery of seized property. For this purpose, the district court is authorized to conduct such further proceedings as it may deem necessary to determine the status of the due process claim and, if the district court deems it feasible during the limited remand, to decide it. The district court is instructed, upon conclusion of its proceedings within the time prescribed for this remand, to advise this panel of the disposition of the due process claim in question, or of the fact that it remains pending.

Submission of this case is withdrawn pending further order of the court.

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED
June 25, 1996
Clerk, U.S. District Court
Central District of California
By Deputy

ENTERED
July 8, 1996
Clerk, U.S. District Court
Central District of California
By Deputy

LAWRENCE PERKINS; CLARA PERKINS; APRIL PERKINS, a minor by and through her Guardian ad Litem, Lawrence Perkins,

Plaintiffs,

v.

THE CITY OF WEST COVINA, et al.
Defendants.

CV 93-7084 SVW
(9th Cir. No. 94-56365)

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

On April 30, 1996, the Ninth Circuit remanded this case to this Court for sixty days "for clarification of the status of the bifurcated claim that West Covina violated due process by failing to provide an adequate post-deprivation procedure for the recovery of seized property." The Ninth Circuit directed this Court to "conduct such further proceedings as it may deem necessary to determine the status of the due process claim and, if the district court deems it feasible during the limited remand, to decide it."

Accordingly, the Court issued an Order stating that such claim in fact was not resolved during the prior proceedings, and the Court invited defendants to file a motion to summary judgment to attempt to resolve the claim during the limited remand. Defendants filed such a motion, plaintiffs filed a cross-motion for summary judgment, and a hearing was held on June 24, 1996. The Court has considered the arguments made by the parties and, for the following reasons, grants defendants' motion and denies plaintiffs' motion.

I. Background

The facts are as follows: On May 21, 1993, some property belonging to plaintiff Lawrence Perkins ("Perkins") was seized from his home by West Covina police officers during a search pursuant to a warrant. The seized property included a quantity of cash and a gun. (Perkins was never prosecuted, and his property was not introduced in evidence in the prosecution of the individual whom the police had been after when they searched Perkins' home.) The police left a form called "Search Warrant: Notice of Service" in Perkins' home after the search and seizure. Def. Exh. 2. This notice stated: "If you wish further information, you may contact Det. Ferrari" or another detective, and gave their phone number. It also identified the searching agency

(West Covina Police), gave the date of the warrant and of the search (May 20, 1993 and May 21, 1993), and identified the issuing court and judge (Dan Oki of the Citrus Municipal Court). Shortly after discovering his property missing, Perkins called Det. Ferrari and inquired about how to get his property back. Another detective informed Perkins that he needed a court order. Perkins Depo. 205:22-206:1.

Then, about a month after the search, Perkins went to the Citrus Municipal Court to try to get his property back. Perkins Depo. 206:5-208:2. He attempted to see Judge Oki, but was told that Oki was on vacation. He then attempted to get another judge to release his property, but was told the court had nothing under his name. Perkins did not submit any kind of written request, fill out any form, go back to the court on any other occasion, or make any other inquires in any manner. Id.

After this action had been pending for a few months, the City filed a request for release of Perkins' property, which a superior court judge signed on June 21, 1994. Perkins received his property (except for a starter pistol which the police retained because it had been reported stolen) on June 24, 1994.

II. Discussion

Perkins contends that California law did not provide him with an adequate means of obtaining the return of the seized property. If he is correct, he wins. If not, he loses. Wood v. Ostrander, 879 F.2d 583, 588 (9th Cir. 1989) ("Parratt v. Taylor, 451 U.S. at 541-44, 101 S. Ct. at 1916-17, and its progeny hold that a deprivation of liberty or property is not cognizable under § 1983 when a state's post-deprivation remedies are adequate to protect a victim's procedural due process rights.") The fact that procedures provided by state law

might be lengthy or speculative, uncertain or incomplete, does not mean they are inadequate under Parratt. Easter House v. Felder, 910 F.2d 1387, 1406 (7th Cir. 1990) (en banc) (citing Hudson v. Palmer, 468 U.S. 533, 104 S. Ct 3194 (1984)).[1] This is a difficult standard for a plaintiff to meet: state procedures are constitutionally adequate "unless the remedy which an injured party may pursue in state court can readily be characterized as inadequate to the point that it is meaningless or non-existent and, thus, in no way can be said to provide the due process relief guaranteed by the Fourteenth Amendment." Id. at 1406.

Critical to this case is the rule that "[a] person cannot state a claim for denial of procedural rights when he has elected to forego a complete hearing." Correa v. Nampa School Dist. No. 131, 645 F.2d 814, 817 (9th Cir. 1981); Riggins v. Bd. of Regents of Univ. of Nebraska, 790 F.2d 707. 711 (8th Cir. 1986) ("A state cannot be held to have violated due process requirements when it has made procedural protection available and the plaintiff has simply refused to avail himself of them [sic]"); Weinrauch v. Park City, 751 F.2d 357, 360 (10th Cir. 1984) ("Having ignored the available procedures, [plaintiff] is in no position to argue that they are unconstitutional"). The rationale behind this waiver rule is aptly illustrated by this case: when the plaintiff doesn't invoke the procedure, it is quite difficult for the court to determine how the procedure works or doesn't work, and thus to rule on its adequacy.

---

[1] Plaintiffs argue that due process required that Perkins be afforded a pre-deprivation hearing before his property could be seized pursuant to the search warrant. The Court rejects this contention.

Here, defendants argue that a constitutionally adequate post-deprivation remedy exists, derived from Cal. Penal Code § 1536. That section provides:

> All property or things taken on a warrant must be retained by the officer in his custody, subject to the order of the court to which he is required to return the proceedings before him, or of any other court in which the offense in respect to which the property or things taken is triable.

In light of this section, police officers are not permitted to return seized property on their own. Rather, property may be released only pursuant to a court order. Section 1536 has thus been held to allow claimants to request the appropriate court to release their property. Such a request is known as a "non-statutory summary proceeding" or motion. See People v. Icenogle (Reiner), 164 Cal. App. 3d 620, 210 Cal. Rptr. 575 (Ct. App. 2 Dist. 1985).[2]

---

[2] Plaintiffs misread Icenogle. In that case, a former criminal defendant was trying to get back $5680 seized from his home. Before he filed a § 1536 motion, though, the police had given the money to the federal authorities and it had been forfeited. The trial court ordered the police to return the seized cash or to pay Icenogle the same amount in cash. The court of appeal reversed, holding that since the trial court no longer had possession of the res, its order amounted to an award of damages which was not authorized in a criminal proceeding. 210 Cal. Rptr. at 577. Plaintiffs say that the claimant in Icenogle was in the same position as Perkins, and that Icenogle shows there is no procedure

Perkins argues that this procedure was not available to him because he did not know the number of the warrant pursuant to which his property was seized. Unfortunately for Perkins, there is no evidence either way about whether one must have the warrant number in order to obtain a court order releasing seized property. Defendants assert that it is not necessary, that as long as the claimant can sufficiently identify the property he seeks (i.e., by providing the date of the warrant, the name of the seizing agency and officer, and the identity of the issuing court and judge, all of which information was in Perkins' possession), the court will release it. Plaintiffs want the Court simply to assume that if Perkins had filed a request with the court, it would have been denied because he did not have the warrant number. But there is no evidence to support that speculation.

Hence the wisdom and necessity of the waiver rule: plaintiff bears the burden of showing the procedure to be inadequate, and if he does not invoke the procedure, he significantly handicaps the Court's ability to determine its adequacy. The Court believes that the waiver rule is fatal to plaintiffs' claim.

---

available to get seized property back. Plaintiffs are mistaken. In this case, the state trial court continued to have jurisdiction to order the release of the property (as evidenced by the fact that it did exactly that when the City requested it to). The fact that the property was not introduced into evidence or marked as an exhibit has nothing whatever to do with whether the property remained "subject to the order of the court" under § 1536. See id. ("this is not an instance where the property at stake was in the possession of the court and thus was subject to a motion for release").

Perkins was told he needed a court order. He was told which court and judge to go to. It is not unreasonable to require him to submit some kind of written request in an attempt to test the adequacy of the procedure. Plaintiffs' counsel says "Lawrence Perkins tried desperately to get his property returned." Oppos. at 2. But that is an egregious mischaracterization of the evidence. As defendants say in their reply, "[t]he evidence shows at most that the plaintiff made one trip to the Municipal Court, was advised that there was no file in his name and ceased any efforts to obtain an order returning his property. He filed nothing, he made no inquiry about the procedures . . . ." Reply at 1.

Plaintiffs argue that Perkins' failure to invoke that § 1536 procedure should be excused because he was not given notice of it. But he was told that he had to get a court order to get back his property, he was told what court and what judge to go to, and he was given the date of the warrant and of the search. The Court believes that Perkins was given all of the information he needed in order to submit an informal written request to the court having jurisdiction over his property. The City's failure to give Perkins formal notice of the procedure did not render that procedure "inadequate to the point that it [wa]s meaningless or non-existent." Easter House, supra.[3]

---

[3] Defendants also argue that state law provided two additional adequate remedies: a writ of mandate and an action for conversion. In view of the Court's holding that plaintiff has failed to show that the § 1536 procedure was constitutionally inadequate, the Court expresses no opinion as to these other two alleged procedures.

III. Conclusion

Even assuming arguendo that Perkins had no means of obtaining the warrant number, the procedure derived from § 1536 for release of property by court order was not such a clearly inadequate remedy as to excuse Perkins' obligation to attempt it. Since he did not do so, thus depriving the Court of the ability to evaluate its adequacy, the Court holds that plaintiffs have failed to prove that state law did not provide a constitutionally adequate remedy for the return of seized property. The Court therefore GRANTS defendants' motion for summary judgment dismissing plaintiffs' procedural due process claim, and DENIES plaintiffs' cross-motion for summary judgment on such claim. In accordance with the limited remand order, the Court will serve this Order upon the Ninth Circuit panel hearing the appeal in this action in order to advise it of the disposition of plaintiffs' procedural due process claim.

IT IS SO ORDERED.

DATED: June 24, 1996

/s/ Stephen V. Wilson
STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
October 22, 1997
By Cathy A. Catterson, Clerk
U.S. Court of Appeals

LAWRENCE PERKINS; CLARA PERKINS; APRIL PERKINS, a minor, by and through her Guardian ad Litem, Lawrence Perkins,
Plaintiffs-Appellants,

v.

THE CITY OF WEST COVINA, et al.
Defendants-Appellants.

No. 94-56365

DC No. CV93-7084 SVW

ORDER

Before: CANBY, BOOCHEVER, and LEAVY, Circuit Judges.

The panel, as constituted above, has unanimously voted to deny the petition for rehearing. Judge Canby, Boochever and Leavy, so recommended to vote to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX G

Fourteenth Amendment of the United States Constitution, Section 1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX H

The Civil Rights Act of 1871, 42 U.S.C. § 1983, *as amended by* Act of Oct. 19, 1996, 110 Stat. 3853.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall be be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

APPENDIX I

California Penal Code section 1536 (West 1985)

"§ 1536. Disposition of property taken; retention subject to order of court in which offense triable

All property or things taken on a warrant must be retained by the officer in his custody, subject to the order of the court to which he is required to return the proceedings before him, or of any other court in which the offense in respect to which the property or things taken is triable."

APPENDIX J

California Penal Code section 1540 (West 1985)

"§ 1540. Restoration of property; property not described in warrant; no probable cause

PROPERTY, WHEN TO BE RESTORED TO PERSON FROM WHOM IT WAS TAKEN. If it appears that the property taken is not the same as that described in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the magistrate must cause it to be restored to the person from whom it was taken."

Supreme Court, U.S.
FILED
MAR 30 1998
CLERK

No. 97-1230

In The

Supreme Court of the United States

October Term, 1997

CITY OF WEST COVINA,

Petitioner,

v.

LAWRENCE PERKINS; CLARA PERKINS; APRIL PERKINS, a minor, by and through LAWRENCE PERKINS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

PATRICK S. SMITH
Counsel of Record
KLASS, HELMAN & ROSS
11766 Wilshire Boulevard,
Suite 200
Los Angeles, California 90025-6538
(310) 277-2224

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether a police department, which seizes property from an innocent third party pursuant to a search warrant and fails to provide the innocent third party with the information necessary to retrieve the property, pursuant to a policy, denies the third party of their rights under the Due Process Clause of the Fourteenth Amendment.

2. Whether due process requires that the written notice already provided to the residents of a location searched should include basic information to adequately notify the wronged person of the information needed to obtain the return of their wrongfully seized property.

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding in the Courts below. However, the issues presented in the Writ of Certiorari do not involve April Perkins, the minor.

TABLE OF CONTENTS

Page

QUESTONS PRESENTED i

PARTIES TO THE PROCEEDING ii

I. STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS 1

II. SUMMARY OF ARGUMENT 2

III. THE PETITION MISREPRESENTS THE COURT OF APPEALS' DECISION REGARDING THE CREATION OF A "NEW" NOTICE REQUIREMENT IN POST-DEPRIVATION PROCEDURAL DUE PROCESS CASES 3

IV. THE PETITION MISREPRESENTS THE COURT OF APPEALS' DECISION AS AN EXPANSION OF PROCEDURAL DUE PROCESS RIGHTS AND THERE EXIST NO CONFLICTING CIRCUIT COURT OR SUPREME COURT DECISIONS 6

V. THE PETITION MISREPRESENTS THAT THE COURT OF APPEALS' DECISION REQUIRES THE GIVING OF "LEGAL ADVICE" 11

VI. CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Barnett v. Centoni, 31 F.3d 813 (9th Cir. 1994)..... 4

Decker v. Hillsborough County Attorney's Office, 845 F.2d 17 (1st Cir. 1988) 4

Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3194 (1984) 4

Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893 (1976) 6, 10

Memphis Light, Gas, & Water Div. v. Craft, 436 U.S. 1, 98 S.Ct. 1554 (1978).....8, 9, 10, 11

Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950) 9

Murphy v. Collins, 26 F.3d 541 (5th Cir. 1994)..... 4

Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908 (1981) 4

United States v. An Article of Device "Theramatic", 715 F.2d 1339 (9th Cir. 1983)..... 4

STATUTES

California Penal Code §1536 12

California Penal Code §1538.5..... 4

I.

STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS

This Petition seeks review of a Ninth Circuit Court of Appeals decision which reversed summary judgment in favor of the City of West Covina. Specifically, the Petition seeks review of a decision finding a due process violation which was properly alleged and advanced by the Respondents in the District Court, timely raised in their appeal before the Ninth Circuit Court of Appeals, and resolved on the merits upon limited remand in the District Court and then, again, before the Court of Appeals. (App. A12-22, D1-3, and E1-8 to Petition for Writ of Certiorari, hereinafter "Pet.App.").

At issue in these proceedings is the constitutionality of a municipal policy regarding notice of seized property left at a search site by the seizing governmental agency and its police officers. Pet.App. A17. At every search of a residence in California, law enforcement officers are required to leave a form "Notice of Search Warrant" document providing certain information to residents of the location. The document, in its present form, attests to the search of the residence and lists the date of the search, the agency conducting the search, the judge who signed the warrant, as well as the name and phone number of the lead detective. Pet.App. A17-18.[1] The police also leave an inventory of the property seized.

---

[1] This document, at a minimum, provides proof to the residents that the home has not been burglarized, but searched pursuant to a court order.

The District Court granted summary judgment in favor of the City's defense that it provided an adequate process for the return of unlawfully seized property and that its notice was also constitutionally sufficient. Pet.App. E. The District Court order, as stated above, followed a limited remand order by the Ninth Circuit, when it became apparent that the due process issue was, "not resolved [by the District Court] during the prior proceedings." Pet.App E2. The District Court, then, resolved the due process issue on its merits, and the case went back up to the Ninth Circuit for final resolution. The Ninth Circuit affirmed the District Court's ruling on the adequacy of the post-deprivation procedure but reversed the District Court finding that the Notice provided by the City was constitutionally adequate. The Court of Appeals found that the notice denies third-party victims of erroneously seized property basic information necessary to obtain return of that property.[2]

II.

SUMMARY OF ARGUMENT

The Petitioner in this case was found liable for violating the Respondent's civil rights, in not providing to the

[2] "The City [has never] disput[ed] that the procedure for obtaining the release of property and the practice of leaving a form written notice at a search site constitute city police for which it is responsible under *Monell*." Pet.App. A13. There is also no dispute that the money seized from the residence was money lawfully earned by the Perkins; the City returned the money to the family. Pet.App. B3. The money was being saved for a trip to visit April's aging grandmother in Louisiana.

Respondents necessary information critical for seeking return of, what turned out to be, their erroneously seized property. (Petition at 2). The Petitioner, and *Amici Curiae*, seek to inflame the passions of this court by presenting, as will be seen, groundless assertions that the Court of Appeals is constitutionalizing state law, is inviting federal intrusion into matters which are traditionally to be resolved by the states, and is requiring the City to give legal advice, thus increasing the potential of municipal liability. Respectfully, all of these arguments are misplaced, without foundation, and, frankly, presented only to arouse inappropriate suspicion of the Court of Appeals.

III.

THE PETITION MISREPRESENTS THE COURT OF APPEALS' DECISION REGARDING THE CREATION OF A "NEW" NOTICE REQUIREMENT IN POST-DEPRIVATION PROCEDURAL DUE PROCESS CASES

A substantial portion of the Petitioners' substantive brief regarding the adequacy of post-deprivation due process remedies is misplaced and beside the point. See, Petition, pp 6-15. The Petitioner presents an extended, and irrelevant, analysis of pre-deprivation and post-deprivation cases. The Respondents do not dispute the fact that this Court, generally, has recognized "two different categories of procedural due process claims. . . . " Petition at 6-7. Admittedly, there is extensive case law on the issue of what constitutes an adequate post-deprivation remedy. Again, however, this analysis is totally irrelevant, mainly because the Ninth Circuit did not decide that the post-deprivation procedure for the return of

property was inadequate. In fact, the Ninth Circuit found that the various remedies for return of erroneously seized property "satisfy the requirements of Due Process." Pet. App. A17 (citation omitted). What the Ninth Circuit found to be constitutionally inadequate was the failure of the "Notice of Search Warrant" to provide the fundamental information needed to obtain the return of the property. Without that basic information, known, at the time, only to the Petitioner, the Respondents were prevented from being able to access the post-deprivation procedures.

Each and every case cited in the Petition does not address that which the Court of Appeals found constitutionally inadequate. In each and every case cited by the Petitioner, and unlike this case, the aggrieved party possessed the basic information needed to adequately access the procedure necessary for return to the property. For example, in *Murphy v. Collins*, 26 F.3d 541, 543 (5th Cir. 1994), *Barnett v. Centoni*, 31 F.3d 813, 816 (9th Cir. 1994), and *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908 (1981), the prisoners, who claimed deprivation of "property," already possessed the basic information necessary to employ the procedural remedy. Additionally, *Decker v. Hillsborough County Attorney's Office*, 845 F.2d 17 (1st Cir. 1988), *United States v. An Article of Device "Theramatic"*, 715 F.2d 1339 (9th Cir. 1983), and *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194 (1984), all involved claims by defendants in criminal proceedings who necessarily possessed the case number and information needed to seek return of property.[3] Not one of the cases cited in the

[3] California Penal Code §1538.5 specifically provides for the right of a defendant in a criminal action to seek return of his property seized pursuant to a search warrant or otherwise during the course of the criminal proceedings or after.

Petition addresses the issue of insufficient notice and the denial of access to the procedural remedy. While, admittedly, each and everyone of these cases found an adequate process in a post-deprivation context, those cases do not address the relevant issue decided by the Court of Appeals.

Again, the Court of Appeals did not find that the post-deprivation remedy was inadequate, only that notice given to the Respondents in this circumstance was constitutionally insufficient, since it prevented them from being able to demand the return of the property. The Ninth Circuit specifically found that the "Notice of Search Warrant" "did not provide essential information necessary to invoke [any] procedure: the search warrant number, the method for obtaining the number from the municipal court (such as the need to furnish the court with the address searched), or the necessity for a written request for return of the property. The notice was 'skeletal' like the notice that the *Memphis Lights* court found unconstitutional." Pet.App. A19. While the Respondents may not be able to assert the constitutional inadequacies of the "burdensome, lengthy, uncertain, or speculative," remedies, if the notice is "skeletal" and does not contain the necessary information "to invoke that procedure," then the notice is constitutionally inadequate. Without the basic information in the Notice, there is no way for an aggrieved party

to seek return of their property under the circumstances in which the Perkins' found themselves.[4]

As a result, while the Court of Appeals has required additional information to be put in the "Notice of Search Warrant," this requirement is consistent with relevant case authority and does not conflict with decision in the Ninth Circuit, decisions in other circuits, or decisions in this Court. See, *infra* §IV. The Petitioner has cited not one case that conflicts with the Ninth Circuit opinion in *Perkins v. City of West Covina*. The Ninth Circuit has set forth a basic, common sense approach, and minimally fair requirement, that municipalities provide basic information in the "Notice of Search Warrant," form (which is already left at the residence) in order to allow an aggrieved person to access the otherwise adequate post-deprivation remedies. Without such notice, the Respondents, or any innocent third-party have no "meaningful opportunity to present their case." *Mathews v. Eldridge*, 424 U.S. 319, 348, 96 S.Ct. 893, 909 (1976).

IV.

THE PETITION MISREPRESENTS THE COURT OF APPEALS' DECISION AS AN EXPANSION OF PROCEDURAL DUE PROCESS RIGHTS AND THERE EXIST NO CONFLICTING CIRCUIT COURT OR SUPREME COURT DECISIONS

The Petitioner complains that the Court of Appeals' decision provides for an "expansion of procedural rights

---

[4] The Perkins circumstances is that of an innocent third-party whose property has been erroneously seized pursuant to a valid search warrant.

in the context of post-deprivation remedies." Pet. at 12. This, of course, is an attempt by the Petitioner to inflame this court with exaggerated claims of violations of local rights, comity, and federalism. There has been neither an expansion of procedural Due Process rights so as to create a "new font of tort law" as asserted by the Petitioner, nor has the Court of Appeals constitutionalized any state law. Finally, there is no Ninth Circuit conspiracy "to expand federal rights under the procedural component of the Due Process Clause." See, Pet. at 21, fn. 2.

The impetus for this case comes in the unique nature of the facts at issue. This court will note that the Perkins were the victims of an erroneous seizure of property pursuant to a properly executed and procured search warrant. This case presents rather unique facts: the Perkins were the unintended victims of a properly executed and procured search warrant. They were "innocent victims" in every sense of the phrase. The Petitioner has never disputed this fact. Under the normal course of events, the execution of a search warrant will presumably result in the seizure of property which is contraband or otherwise used in a crime. This is the rather unique case where non-contraband property was seized from an innocent third-party under a sealed search warrant. These facts have exposed the inadequacy of the notice given to innocent persons by the municipality in "Notice of Search Warrant." Nevertheless, this circumstance is not unheard of and due process requires protection for these innocent third-parties.

As far as counsel can see, no other decision in this Court or the Circuit Courts of Appeals have addressed the issue of the adequacy of the information contained in

the "Notice of Search Warrant." The Petition cites not one case that addresses the issue. For the Petitioner to assert that this minimal notice requirement conflicts with this court's decisions and decisions in other circuits is, at best, exaggeration, and, more accurately, incorrect.

The facts of this case expose the inadequacy of the required notice. The notice is inadequate in that it did not provide the basic and elemental information needed to adequately seek return of erroneously seized property. Mr. Perkins "made a number of telephone calls and at least two trips to the City's police station, one with his daughter and a trip to the municipal court. While the police told him he needed a 'court order' there is no evidence that they explained how to *go about getting the correct warrant number* or pointed out the need for a written request." Pet. App. A19. The Respondents' attempt to access the procedure for return of property failed for one specific reason – the information given to them was inadequate to obtain a hearing before the appropriate authorities to seek return of the property. Mr. Perkins' failures in court and at the police station are a testament to that fact. The Court of Appeals decision merely interprets what notice is adequate, and, by no stretch of the imagination does it establish a new right; it merely clarifies the notice requirement.

In *Memphis Light, Gas, & Water Div. v. Craft*, 436 U.S. 1, 98 S.Ct. 1554 (1978), this court dealt with a remarkably similar set of circumstances. In *Memphis Light*, this court found that the procedures for resolution of disputed utility bills was adequate and constitutionally sufficient. However, this court also found that the *notice* to the

customers was insufficient to satisfy due process. As the Court of Appeals quoted

> [T]he notification procedure, while adequate to apprise the [plaintiffs] of the threat of termination of service, was not "reasonably calculated" to inform them of the availability of "an opportunity to present their objections" to their bills. *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950). The purpose of notice under the Due Process Clause is to apprise the effected individual of, and permit adequate preparation for, an impending "hearing." Notice in a case of this kind does not comport with constitutional requirements when it does not advise the customer of the availability of a procedure for protesting a proposed termination of utility service as unjustified. As no such notice was given respondents – despite "good faith efforts" on their part – they were deprived of the notice which was their due.

Memphis Lights, 436 U.S. at 14-15 (footnotes omitted).

The attempts in the Petition to distinguish *Memphis Lights* is inadequate. First, the Petitioner seeks to distinguish the case by asserting that the utility "had authority over the 'res' in question. . . . " This attempt to distinguish *Memphis Lights* fails for specific reasons. First, the City has "never disputed that the procedure for obtaining the release of property and the practice of leaving a form written notice at a search cite constitute City policy for which it is responsible under *Monell*." Pet. App. A13. The Petitioner cannot now claim some sort of impotency with

regard to the issues in this case. Second, the basic foundation and essence of due process is the providing of adequate notice to the person whose property interests are put in jeopardy. *Mathews v. Eldridge*, 424 U.S. at 348, 96 S.Ct. at 909. Without notice of the right to seek return of the property, *and the notice of the means by which to achieve such*, no lay person could negotiate the complications and mire of the legal process. The search warrant number is absolutely critical to even obtaining a hearing in court. As such, it is the seizing agency's duty to give the proper notice in the case, primarily because it is in the best position to do so. Any agency other than the Petitioner is in no position to give adequate notice to the Respondents. Even in *Mathews*, this Court recognized that "process" requires that the person be given written notice of the reasons for the deprivation and notification "informing" the person of his right to seek reconsideration by the state agency involved. *Mathews*, 424 U.S. at 338, 96 S.Ct. at 904.

The other distinction that the Petitioner seeks to draw in *Memphis Lights* is the fact that the utility in that case was the agency which developed the "internal procedure for the resolution of disputed bills prior to a proposed termination." Petition at 12 (citation omitted). Clearly, the Court of Appeals in this case found that the Petitioner gave only "skeletal" notice to the Respondents with regard to their right to seek return of the property. As such, the Petitioner recognizes it has an obligation to provide some notice at the search site. To the extent that the courts are a different governmental agency, they are so inextricably intertwined with Petitioner in the search warrant process, at least at this stage, that it is not unfair to impose this minimally additional notice requirement in

the "Notice of Search Warrant" form. The burden on the municipality is minimal, and the benefit is enormous.

With regard to the text of the notice, the Ninth Circuit indicated that, at a minimum, the notice should inform the recipient of the procedure for contesting the seizure, i.e., that the aggrieved party must seek a court order, and provide "any additional information required for initiating that procedure in the appropriate court." Clearly, this means that "the notice must include the search warrant number or . . . [other] means of identifying the court file." *Id.* This is information is appropriately and accutely directed to the municipality's rights and obligations regarding the procurement, service, and execution of a search warrant.

V.

THE PETITION MISREPRESENTS THAT THE COURT OF APPEALS' DECISION REQUIRES THE GIVING OF "LEGAL ADVICE"

Both the Petitioner and *Amici Curiae* erroneously assert that the Court of Appeals' decision requires the giving of legal advice. This clearly overstates the Court of Appeals' decision. As stated previously, in reality, the only additional information that is needed in the "Notice of Search Warrant" form (which is already served at the search site), is that additional basic information which identifies the search warrant number given to the case to allow identification of the court file and the direction to seek a court order. This basic, fundamental, and rudimentary information allows the aggrieved party to initiate the

procedure for the return of property. A short plain statement about California Penal Code §1536, the right to petition the court for return of property along with the search warrant number or where to locate it, is all the information that is needed to satisfy the requirements of due process as stated by the Court of Appeals. It is the failure to provide this minimal information that led to the due process violation. Municipalities routinely provide similar such notice in numerous contexts. To assert that this information, somehow, constitutes legal advice to the recipient of the "Notice of Search Warrant" expands the parameters of the practice of law to an absurd degree.

Moreover, this requirement does not expose the municipality to untold liability. The assertion that municipalities will be exposed to any improper liability is absurd and needs no further comment.

VI

CONCLUSION

For the foregoing reasons, Respondents respectively request that the Court deny the Petition for Writ of Certiorari.

DATED: March 30, 1998

KLASS, HELMAN & ROSS

PATRICK S. SMITH
Attorneys for Respondents

MOTION FILED

FEB 2 6 1998

No. 97-1230

In The

Supreme Court of the United States

October Term, 1997

CITY OF WEST COVINA,

Petitioner,

vs.

LAWRENCE PERKINS; CLARA PERKINS; APRIL PERKINS, a minor, by and through LAWRENCE PERKINS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION OF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

ROBERT FLANDRICK
Counsel of Record
RUFUS C. YOUNG
Attorneys for Amici Curiae

BURKE, WILLIAMS & SORENSEN
611 West Sixth Street
Suite 2500
Los Angeles, California 90017
(213) 236-0600

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

MOTION OF *AMICI CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37.2, sixty-seven cities, counties and towns within the State of California respectfully move for leave to file the accompanying brief *amici curiae* in support of the petition in this case. These cities, counties and towns are listed in the Appendix to this brief. Counsel for petitioner has consented, but counsel for respondents has withheld consent.

February, 1998

Respectfully submitted,

Robert Flandrick
Rufus C. Young
Attorneys for Amici Curiae

QUESTIONS PRESENTED

1. Are municipal officials qualified and able to give the type of notice required by the Ninth Circuit in *Perkins v. City of West Covina*, 113 F.3d 1004 (1997) (CA9)?

2. Did the Ninth Circuit correctly apply *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978), to the facts of this case?

3. Does the Ninth Circuit's notice requirement have an adverse impact on municipal liability?

TABLE OF CONTENTS

Page

MOTION OF *AMICI CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI 1

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

AMICI CURIAE BRIEF OF SIXTY-SEVEN CALIFORNIA CITIES, COUNTIES AND TOWNS 1

INTEREST OF THE *AMICI CURIAE* 1

ARGUMENT 2

I. The *Perkins* notice requirement imposes a duty on municipal officers who do not have legal training to provide legal advice contrary to law and sound public policy 2

A. The notice required by the court in *Perkins* goes beyond well-established standards for notice of constitutionally-protected rights 2

B. Municipal officials and police officers are not qualified to give legal advice and any requirement that they do so is contrary to law and public policy 6

II. *Memphis Light's* notice requirement applies to municipally-created and controlled dispute resolution procedures, not to judicial procedures 13

III. The *Perkins* notice requirement unduly increases municipal liability 16

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Nelson, 352 F.Supp. 1124 (1972) (D.C.N.D. CA) 3

Matthews v. Eldridge, 424 U.S. 319 (1976) 2, 3

Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978) 4, 5, 13, 14, 15

Miranda v. Arizona, 384 U.S. 436 (1966) 7, 8, 17

Mullane v. Hanover Bank & Trust Co., 339 U.S. 306 (1949) 3

People v. Kuder, 90 Cal. App. 594 (1928) 13

People v. Merchants Protective Corp., 189 Cal. 531 (1922) 6

People v. Rhodes, 12 Cal. 3d 180 (1974) 10

Perkins v. City of West Covina, 113 F.3d 1004 (1997) (CA9) ..... *passim*

SECONDARY AUTHORITY

12 CAL. JUR. 3D *Clerks of Court* § 1 (1972) 1, 3

STATUTES

CAL. BUS. & PRO. CODE § 6126(a) 6, 12

CAL. GOV'T CODE § 1031 7

CAL. GOV'T CODE § 24004 9

CAL. GOV'T CODE § 24004.5 9

CAL. GOV'T CODE § 36502 11

CAL. GOV'T CODE § 36503 11

TABLE OF AUTHORITIES – Continued

Page

CAL. GOV'T CODE § 40801 12
CAL. GOV'T CODE § 40802 12
CAL. GOV'T CODE § 40803 12
CAL. GOV'T CODE § 40806 12
CAL. GOV'T CODE § 40810 12
CAL. GOV'T CODE § 40811 12
CAL. GOV'T CODE § 40812 12
CAL. GOV'T CODE § 40813 12
CAL. GOV'T CODE § 40814 12
CAL. GOV'T CODE § 41801 9
CAL. GOV'T CODE § 41805 10

AMICI CURIAE BRIEF OF SIXTY-SEVEN CALIFORNIA CITIES, COUNTIES AND TOWNS

INTEREST OF THE *AMICI CURIAE*

This brief is submitted with permission of the Petitioner City of West Covina on behalf of sixty-seven cities, counties and towns within the State of California as *amici curiae* in support of the Petitioner City of West Covina for issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in the case of *Perkins v. City of West Covina*, 113 F.3d 1004 (1997) (CA9). The names of the cities are attached as an Appendix to this brief.

Amici respectfully submit that the ruling of the Ninth Circuit Court of Appeals in *Perkins* imposes a substantial and impractical burden on local governments that is contrary to public policy and law. If allowed to remain as controlling law, the ruling in *Perkins* will require local governmental entities to provide substantive legal advice with regard to court procedures for obtaining return of legally-seized property to those individuals whose property has been taken pursuant to legitimate and valid search warrants. Under the guise of an expanded "notice" requirement, the court has set forth a requirement for police officers and other city officials who are not attorneys to provide legal advice on matters outside their knowledge or control. The ruling poses the risk of expanded liability for local public entities for the unauthorized practice of law, as well as setting up conflicting duties and obligations for local governmental employees.

Amici urge the Court to grant certiorari in this case and reverse the determination of the Court of Appeals.

ARGUMENT

I. The *Perkins* notice requirement imposes a duty on municipal officers who do not have legal training to provide legal advice contrary to law and sound public policy.

The primary flaw in the reasoning of the court in *Perkins* is the assumption that reasonable notice requires public officials to explain judicial procedures to those seeking to obtain return of property legally seized in the course of police investigations. Explanation of such procedures, which are established by the courts and not by municipalities, counties or towns, puts local officials in the position of rendering legal advice to individuals who are inherently adverse to the governmental entity served by such officials. Not only are untrained public employees required to give legal advice that could constitute the unauthorized practice of law, such employees are required to give advice that may be directly in conflict with the interests of the public entity which they are sworn to serve. The purported "notice" required by the court in *Perkins* goes far beyond standard notice requirements, and if allowed to stand, will place public employees in an untenable position.

A. The notice required by the court in *Perkins* goes beyond well-established standards for notice of constitutionally-protected rights.

Due process of law requires that an individual deprived of a constitutionally protected liberty or property interest be given notice and an opportunity to be heard before such deprivation becomes permanent. *See Matthews v. Eldridge*, 424 U.S. 319 (1976). According to the

Court in *Matthews*, "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *Id.* at 333. However, due process "is not a fixed set of rights, it 'is flexible and calls for such procedural protections as the particular situation demands.' " *Anderson v. Nelson*, 352 F.Supp. 1124, 1128 (1972) (D.C.N.D. CA). Thus, the type of notice required by procedural due process varies according to the facts of each case.

The Supreme Court has established a constitutional minimum for sufficient notice. Notice should be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1949). Additionally, "[t]he notice must be of such nature as reasonably to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance." *Id.* Moreover, "[t]he reasonableness and hence the constitutional validity of any chosen method may be defended on the grounds that it is in itself reasonably certain to inform those affected." *Id.* at 315. Thus, constitutionally-sufficient notice does not require that an individual be informed of his legal recourse in a particular situation, but merely that he be informed that an action is pending against him in a manner that allows him to defend against the action.

The Ninth Circuit has unduly expanded the concept of constitutionally-sufficient notice in *Perkins* by requiring that police officers give legal advice to the very individuals against whom such police officers act in

seizing property in connection with criminal investigations. The Court of Appeals stated that constitutionally-adequate notice,

> . . . must inform the recipient of the procedure for contesting the seizure or retention of the property taken, along with any additional information required for initiating that procedure in the appropriate court. In circumstances such as those presented by this record, the notice must include the search warrant number or, if it is not available or the record is sealed, the means of identifying the court file. It also must explain the need for a written motion or request to the court stating why the property should be returned. (Petition at 5).

While much of this notice requirement appears to be reasonable, and in fact was complied with in *Perkins*, the language requiring information about the need for a written motion or request to the court goes beyond notice and extends into the realm of legal advice. Court procedures and requirements change and vary according to local rules. A requirement for a written motion might be required in one jurisdiction but not in another. To meet the notice requirement in *Perkins*, public entities must be continually updated and apprised of such procedures and must take responsibility for adjusting the notices given as changes in court-mandated procedures occur. Ordinarily, the responsibility for determining how to proceed rests with the individual and his or her legal adviser, not with local governmental officials.

Justice Stevens argued against exactly this type of detailed notice in his dissent in *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978). He stated that a more

detailed notice requirement "rests on a paternalistic predicate that I cannot accept." *Id.* at 26. Essentially, the question is whether the individual assumes responsibility for finding out what procedural rules apply, or whether governmental entities that do not set such rules must act *in parens patriae*. Historically, the Court has rejected the notion that government must take on such paternal responsibilities.

The facts of the *Perkins* case demonstrate the folly of attempting to make local government responsible for the proper assertion of individual rights. According to the California district court, "Perkins was told he needed a court order. He was told which court and judge to go to. It is not unreasonable to require him to submit some kind of written request in an attempt to test the adequacy of the procedure." (Petition at E-7). Additionally, the court found that Perkins did not make a concerted effort to get his property returned. It stated that he " . . . made one trip to the Municipal Court, was advised that there was no file in his name and ceased any efforts to obtain an order returning his property. He filed nothing, he made no inquiry about the procedures . . . "(Petition at E-7). Thus, Perkins' deprivation of property did not arise because of constitutionally-inadequate notice but because of his failure to initiate the judicial remedy available to him. Constitutionally-adequate notice in this case does not require the detailing of legal procedure nor advice on how to initiate this procedure. The failure on the part of the plaintiff to make the effort to properly assert his rights does not justify placing a constitutional burden on local government and police departments to provide legal

advice to individuals whose property has been seized pursuant to a search warrant.

B. Municipal officials and police officers are not qualified to give legal advice and any requirement that they do so is contrary to law and public policy.

Municipal officials who are non-lawyers are prohibited from giving the legal advice required by *Perkins*. According to California Business and Professions Code section 6126(a) (Deering 1997), any person advertising or holding himself or herself out as practicing or entitled to practice law or otherwise practicing law who is not an active member of the State Bar, is guilty of a misdemeanor. The definition of the practice of law includes the giving of legal advice. For instance, in *People v. Merchants Protective Corp.*, 189 Cal. 531 (1922), the California Supreme Court held that a corporation comprised of non-lawyers could not, as its business, provide legal services to its members. These legal services included the giving of legal advice. According to the Court, " . . . under the laws of California, individuals may not, either singly or in association, engage in the practice of law without having a special license to do so." *Id.* at 533. Since *Perkins* requires municipal officials who are not lawyers to engage in the practice of law, it also requires that these officials violate the law.

Not only are municipal officials prohibited from giving legal advice, most are unqualified to do so. For instance, police officers are not qualified to give legal advice. California state law specifies minimum eligibility

requirements for police officers. To become a police officer, an individual must be a citizen of the United States who is at least 18 years of age and of good moral character (Cal. Gov't Code § 1031 (Deering 1997)). Additionally, an aspiring police officer must disclose any past criminal record he may have and must be free of any physical, mental, or emotional condition which might adversely affect his exercise of the powers of a peace officer. *Id.* Finally, an aspiring officer must have the equivalent of a high school diploma. *Id.* To become a police officer in California, an individual is not required either to be an attorney or to have any legal education or training. Thus, the giving of legal advice is beyond the expertise of police officers.

Perkins inappropriately requires police officers to provide legal advice to individuals whose property is seized pursuant to a search warrant. By providing this advice, police officers are legally assisting the same individuals they are collecting evidence against. Thus, the *Perkins* notice requirement creates a conflict of interest for police officers.

The ruling in *Perkins* contrasts dramatically with the care taken by the Supreme Court in crafting notice requirements in the case of *Miranda v. Arizona*, 384 U.S. 436 (1966). There, the Court carefully defined the contours of an individual's Fifth Amendment right not to incriminate himself when he is in police custody and required police officers to give only that information necessary to alert the individual to his rights. Specifically, the Court stated that " . . . [a] person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he

has the right to the presence of an attorney, either retained or appointed." *Id.* at 444.

The Court went on to delineate the entirely different role of an attorney for the accused which may include advising his client not to talk to the police until he has an opportunity to investigate the case, or remaining with his client during police questioning. *Id.* at 480. The Court further stated that this role for the attorney " . . . is not cause for considering the attorney a menace to law enforcement. He is merely carrying out what he is sworn to do under oath – to protect to the extent of his ability the rights of his client." *Id.* The Court's ruling in *Miranda* notes the distinction between the role of an attorney which is to give legal advice with regard to procedures and the duty of a police officer which is to give notice of the existence, rather than the legal parameters, of specific rights.

Under *Miranda*, police are required only to inform a suspect of his Fifth Amendment rights against self-incrimination. This notice alerts the accused that protection of these rights may require the presence of an attorney. Officers are not required to tell suspects about the legal remedies they may have, however, if their Fifth Amendment rights are violated. Nor does this notice inform individuals as to how they may initiate proceedings against the police if this constitutional deprivation occurs. If officers were forced to give suspects this information, they would be placed in the position of legally assisting the same individuals they are collecting evidence against. The *Perkins* decision confuses the role of

the police officer with the role of an attorney and by doing so creates a conflict of interest for these officers.[1]

In a municipality, the city attorney is the individual who advises city officials on all legal matters pertaining to city business (CAL. GOV'T CODE § 41801 (Deering 1997)). Thus, in order to fulfill the *Perkins* notice requirement, it could be argued that municipal officials and police officers should consult with the city attorney and ask the city

[1] The *Perkins* decision also poses problems in the unusual situation where a police officer also happens to be a licensed attorney. Two sections of the California Government Code apply to peace officers who are also attorneys at the county level. One section of the code states that sheriffs, clerks, constables, or any of their deputies shall not practice law (CAL. GOV'T CODE § 24004). An exception to this rule exists for deputy sheriffs. A deputy sheriff may practice law if he gives legal advice to his employer that is within the course and scope of his employment or if he represents an individual in civil matters with which the deputy sheriff does not have or will not have any association (*Id.* 24004.5).

If peace officers at the county level who are also attorneys are required to give legal advice to individuals whose property has been seized they will violate the California Government Code. Although deputy sheriffs may give legal advice in limited instances, they may not give legal advice to anyone who is not their employer. An individual whose property is seized pursuant to a search warrant is not a deputy sheriff's employer. Additionally, if the deputy sheriff seized the property or performed any act relating to the seizure of the individual's property, he is prohibited from giving legal advice to that individual. Thus, the *Perkins* notice requirement forces peace officers who are also attorneys to choose between violating either California's Government Code or judicially-created law.

attorney to provide the required legal advice. This consultation is required under the municipal government scheme.

However, this consultation is inappropriate in cases where a municipal officer seeks advice from the city attorney for an individual who has violated a city ordinance or is accused of a crime. A city attorney may not assist in the defense of an individual who has violated any ordinance of the city he represents. This rule applies regardless of whether the city attorney has prosecutorial responsibilities on behalf of the city by which he is employed (*Id.* § 41805). Additionally, if the city attorney has prosecutorial responsibilities, he may not defend or assist in the defense of persons accused of crimes. *People v. Rhodes*, 12 Cal. 3d 180, 187 (1974). This rule is a judicially-created rule of criminal procedure. *Id.* at 186.

These limits on a city attorney's powers coupled with the *Perkins* notice requirement create a conflict for city attorneys. Individuals most likely to sue a municipality for failure to provide constitutionally-adequate notice that resulted in a deprivation of a liberty or property interest are individuals who have violated a city ordinance or are accused of a crime. For instance, most individuals whose property is the subject of a search warrant are criminal suspects. If a criminal suspect's property is seized pursuant to a search warrant and he is not home when the seizure occurs, *Perkins* requires that police officers provide this suspect with notice of the seizure that contains legal advice. If a police officer contacts the city attorney to obtain this advice, and the city attorney has

prosecutorial responsibilities, the city attorney will violate a rule of criminal procedure if he provides this advice. If the city attorney refuses to provide this legal advice, he puts the police officer, an individual with no formal legal training, in the position of having to provide this advice or incur municipal liability.

In a municipality, many roles assumed by public employees involve dealing with the public in areas where legal issues arise. Because governmental officials are not trained legal advisors, statutory provisions have been enacted strictly limiting public employees with regard to providing the public with legal advice as to how to proceed in various matters. City clerks, for example, are required to give information with regard to a wide variety of matters that involve legal consequences for individuals. For instance, election deadlines have serious consequences for individuals seeking public office. Nevertheless, it is well established that where any question arises as to legal procedures, city clerks decline to advise individuals on such matters because to do so would be to give legal advice, rather than just public notice.

California law does not require that city clerks be attorneys nor have any legal education. Under general California law, city clerks are elected by city electors (CAL. GOV'T CODE § 36503 (Deering 1997)). To be elected as a city clerk, an individual may not be an elector of the city and must have resided in the electing city for the year preceding his election (*Id.* § 36502). These eligibility requirements do not mandate that a city clerk have any legal education. Thus, city clerks are generally not qualified to give legal advice and are prohibited from doing so

under the provisions of California Business and Professions Code section 6126(a) (Deering 1997).

Additionally, the California state legislature has prescribed the duties of city clerks in the state's Government Code.[2] The pertinent sections of this code do not authorize city clerks to give legal advice. Additionally, city clerks do have duties that pertain to the judicial system. They maintain books with city ordinances and may take and certify affidavits and depositions. However, these duties do not require that clerks either interpret or advise individuals about the law. After *Perkins*, in order to avoid

[2] According to the Code, these duties are as follows: 1) City clerks maintain accurate records of the proceedings of the city's legislative body and board of equalization (CAL. GOV'T CODE § 40801); 2) City clerks act as accounting officers of the city and maintain records of the financial codes of the cities (*Id.* § 40802); 3) City clerks summarize the city's financial report and publish it in a paper of general circulation or post the report in public places (*Id.* § 40803); 4) City clerks keep a book marked "ordinances" and record in it all city ordinances with his certification annexed to each, stating: (a) It is a true and correct copy of a city ordinance; (b) The ordinance number; and (c) It has been published or posted pursuant to law (*Id.* § 40806); 5) City clerks are the *ex officio* assessors unless the legislative body provides for the assessment and collection of city taxes by county officers or otherwise (*Id.* § 40810); 6) City clerks are custodians of the city seal (*Id.* § 40811); 7) City clerks may have additional duties as prescribed by statute (*Id.* § 40812); 8) City clerks may appoint deputies (*Id.* § 40813); 9) City clerks and their deputies may administer oaths or affirmations and take and certify affidavits and depositions pertaining to city affairs and business which may be used in any court proceeding in the state (*Id.* § 40814).

municipal liability, city clerks will go beyond the scope of their statutorily-defined duties and provide legal advice on judicial procedure.

City clerks are less conversant with judicial procedure than clerks of court. Yet, clerks of court are prohibited from interpreting judicial procedure. Clerks of court have no judicial authority unless the constitution or legislature provides them with this authority. *See People v. Kuder*, 90 Cal. App. 594 (1928) (where the court stated, "It has uniformly been held that ordinarily the clerk of court is but a ministerial officer and is clothed with no judicial powers." *Id.* at 600.) Generally, a clerk of court has no authority to hear evidence, to determine whether a demurrer or answer has been served on an attorney, to construe pleadings or rights thereunder, or to pass on whether an answer to a complaint is defective, irregular, or insufficient to constitute a defense. 12 CAL. JUR. 3D *Clerks of Court* § 1 (1972). These prohibitions on a clerk's exercise of his authority indicate that a clerk of court should not interpret legal procedure. If a clerk of court should not interpret legal procedure, it follows that a city clerk, who has less knowledge about legal procedure than a clerk of court, should not give legal advice on this procedure.

II. *Memphis Light's* notice requirement applies to municipally-created and controlled dispute resolution procedures, not to judicial procedures.

In *Perkins*, the Ninth Circuit justified its new notice requirement on the basis of *Memphis Light, Gas, & Water Div. v. Craft*, 436 U.S. 1 (1978). In *Memphis Light*, the

Supreme Court required a municipal utility company to provide information to its customers about its own internal dispute resolution procedures. These procedures were essentially created by the municipality since the utility company functions under the ultimate control of the municipal government.[3] Thus, provision of notice to a customer which "inform[s] the customer not only of the possibility of termination but of a procedure for challenging a disputed bill," *Id.* at 12, does not require that a municipal utility company inform itself of dispute resolution procedures outside of its control or expertise.

However, the Ninth Circuit in *Perkins* used the Court's holding in *Memphis Light* to force municipal agencies, police departments, to inform individuals about judicial remedies which they did not create and do not control. Specifically, the Ninth Circuit required that the police provide notice that "inform[s] the recipient of the procedure for contesting the seizure or retention of the property taken, along with any additional information required for initiating that procedure in the appropriate court." (Petition at 5). Unlike the municipal utility company in *Memphis Light*, the police department did not create the judicial procedures available to aggrieved individuals. These procedures are not dispute resolution procedures internal to the police department but local-law remedies. These local-law remedies are contained in the

[3] In *Memphis Light*, the Court indicated that, "Memphis Light, Gas and Water Division (MLG&W) is a division in the city of Memphis which provides utility service. It is directed by a Board of Commissioners appointed by the City Council, and is subject to the ultimate control of the municipal government." *Id.* at 1.

California Penal Code and were created by the state legislature, not the municipal government. Thus, the municipality does not have ultimate control over these procedures. The *Perkins* notice requirement goes beyond Supreme Court's notice requirement in *Memphis Light*.

Not only does the *Perkins* notice requirement expand the concept of constitutionally-adequate notice, it also expands it in a manner rejected by the Court in *Memphis Light*. In this case, the plaintiffs could have pursued their remedy either through the municipal utility company or the court system. Although the Court required that the municipal utility company provide information to the plaintiffs on their internal dispute resolution procedures, it did not require that the municipal utility company provide information to the plaintiffs on local-law remedies. The Court mentioned the availability of these judicial remedies, stating, "An aggrieved customer [of a municipal utility company] may be able to enjoin a wrongful threat to terminate, or to bring a subsequent action for damages or a refund. The availability of such local-law remedies is evidence of the State's recognition of a protected interest." *Memphis Light*, 436 U.S. at 11. However, the Court did not require that the municipal utility company inform the aggrieved customer of these legal remedies. According to Justice Stevens' dissent, the Court wisely avoided requiring that municipal utility companies provide this type of "legal advice" to customers. *Id.* at 26. Thus, *Memphis Light* implies that municipalities should not be required to give legal advice on judicial remedies. The Ninth Circuit ignored this implication when it asserted that constitutionally-adequate notice requires a municipality to offer legal advice.

III. The *Perkins* notice requirement unduly increases municipal liability.

The *Perkins* decision unduly and unjustly increases municipal liability and exposure to claims. Under *Perkins*, police departments will be required to provide legal advice to individuals whose property is seized pursuant to a search warrant in order to avoid liability under section 1983. Civil rights litigants may use the *Perkins* decision as precedent to argue in other factual settings that police action deprived them of a liberty or property interest and that the police's notice with regard to this deprivation did not contain the adequate legal advice. If police departments do not accurately predict the factual circumstances in which a plaintiff could successfully make this argument, municipalities will face greater liability.

Police departments are not the only municipal agencies affected by the *Perkins* decision. If this decision is interpreted broadly by the courts, all municipal agencies will be subject to this same notice requirement if agency action deprives an individual of a constitutionally-protected liberty or property interest. Thus, if these agencies fail to give an affected individual notice with adequate legal advice they may be held liable under a section 1983 action.

CONCLUSION

The ruling of the Ninth Circuit Court of Appeals in *Perkins* is ill-conceived and far too broad in its implications for local government and local police departments. Rather than establishing a simple *Miranda*-like notice requirement, the court has imposed a duty on local government and police officers to provide substantive legal advice to the very individuals against whom action has been taken. Further, the advice that must be given concerns procedures that are established, implemented and controlled by the courts, not by local governmental entities. Such procedures are subject to change without notice to local government employees or police officers, and simply being certain that the advice given under *Perkins* continues to be correct imposes a substantial burden on local government.

If change in the existing notice requirements is warranted, then it would be prudent to limit that change to a simple statement that any individual deprived of property pursuant to a legitimate search warrant has the right to contact an attorney for assistance in recovering such property.

Any additional requirement that a local governmental agency advise individuals with regard to court procedures available for the recovery of property would pose an undue burden on local government and would expose governmental entities, funded by taxpayers, to unnecessary and unwarranted liability for their actions in attempting to comply with the requirements set forth in *Perkins*.

Accordingly, we respectfully request the Court to grant certiorari and urge reversal of the decision of the Court of Appeals.

Respectfully submitted,

ROBERT FLANDRICK
RUFUS C. YOUNG
BURKE, WILLIAMS & SORENSEN
Attorneys for Amici Curiae

APPENDIX

LAW OFFICERS OF CITIES SUBMITTING BRIEF
AMICI CURIAE

City of Alameda – Carol A. Korade, City Attorney

City of Anaheim – Jack L. White, City Attorney

City of Avalon – Pamela Albers, City Attorney

City of Bakersfield – Judy K. Skousen, City Attorney

City of Barstow – Michael G. Colantuono, City Attorney

City of Benicia – Heather C. McLaughlin, City Attorney

City of Burbank – Terry B. Stevenson, City Attorney

City of Carlsbad – Ronald R. Ball, City Attorney

City of Chino – Jimmy L. Gutierrez, City Attorney

City of Chula Vista – John M. Kaheny, City Attorney

City of Coachella – Jimmy L. Gutierrez, City Attorney

City of Colma – Roger C. Peters, City Attorney

City of Corcoran – Michael N. Nordstrom, City Attorney

City of Cotat – Jeffrey A. Walter, City Attorney

City of Dunsmuir – Elizabeth K. McCarthy, City Attorney

City of El Cajon – Lynn R. McDougal, City Attorney

City of Eureka – David E. Tranberg, City Attorney

City of Fremont – Harvey E. Levine, City Attorney

City of Gardena – Lisa Kranitz, City Attorney

City of Glendale – Scott H. Howard, City Attorney

City of Gustine – Francis R. Ruggieri, City Attorney

City of Hayward – Michael O'Toole, City Attorney

City of Hollister – Elaine M. Cass, City Attorney

City of Lafayette – Charles J. Williams, City Attorney

City of Laguna Beach – Philip D. Kohn, City Attorney

City of Loma Linda – Richard E. Holdaway, City Attorney

City of Los Alamitos – Thomas W. Allen, City Attorney

City of Los Altos – Robert K. Booh, Jr., City Attorney

City of Los Angeles – James K. Hahn, City Attorney

City of Madera – Joseph Soldani, City Attorney

City of Merced – Steven F. Nord, City Attorney

City of Montclair – Diane Robbins, City Attorney

City of Montebello – Jonathan B. Stone, City Attorney

City of Monterey – William B. Conners, City Attorney

City of Monterey Park – Anthony Canzoneri, City Attorney

City of Napa – Thomas B. Brown, City Attorney

City of Needles, Robert W. Hargreaves, City Attorney

City of Novato – Jeffrey A. Walter, City Attorney

City of Palm Desert – David J. Erwin, City Attorney

City of Redondo Beach – Jerold A. Goddard, City Attorney

City of Rialto – Robert A. Owen, City Attorney

City of San Buenaventura – Donna Laderos, City Manager

City of San Bruno – Jonathan P. Lowell, City Attorney

City of San Diego – Leslie E. Devaney, Executive Assistant City Attorney

City of San Luis Obispo – Jeffrey G. Jorgensen, City Attorney

City of San Pablo – Brian M. Libow, City Attorney

City of San Rafael – Gary T. Ragghianti, City Attorney

City of Santa Paula – Phillip H. Romney, City Attorney

City of Simi Valley – John Torrance, City Attorney

City of Stanton – Thomas W. Allen, City Attorney

City of Sunnyvale – Valeria J. Armento, City Attorney

City of Tracy – Debra E. Corbett, City Attorney

City of Twentynine Palms – A. Patrick Munoz, City Attorney

City of Vacaville – Charles O. Lamoree, City Attorney

City of Vallejo – John M. Powers, City Attorney

County of Calaveras – Spencer B. Batchelder, County Counsel

County of Kern – Bernard C. Barmann, Senior, County Counsel

County of Lake – Cameron L. Reeves, County Counsel

County of Merced – Dennis L. Myers, County Counsel

County of Modoc – Hugh Comisky, County Counsel

County of Mono – Marshall S. Rudolph, County Counsel

County of San Diego – Morris G. Hill, Deputy County Counsel

County of Shasta – Karen Keating Jahr, County Counsel

County of Tulare – Kathleen Bales-Lange, County Counsel

Town of Corte Madera – Jeffrey A. Walter, Town Attorney

Town of Ross – Hadden Roth, Town Attorney

Town of San Anselmo – Hadden Roth, Town Attorney

Town of Tiburon – Ann R. Danforth, Town Attorney

Supreme Court, U.S.
FILED
JUN 23 1998
CLERK

No. 97-1230

In The

Supreme Court of the United States

October Term, 1997

CITY OF WEST COVINA,

Petitioner,

vs.

LAWRENCE PERKINS; CLARA PERKINS; APRIL PERKINS, a minor, by and through LAWRENCE PERKINS,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

DAVID D. LAWRENCE*
CINDY S. LEE
FRANSCELL, STRICKLAND, ROBERTS & LAWRENCE
225 South Lake Avenue, Penthouse
Pasadena, California 91101
(626) 304-7830
Counsel for Petitioner

PATRICK S. SMITH*
KLASS, HELMAN & ROSS
11766 Wilshire Boulevard
Suite 200
Los Angeles, California 90025-6538
(310) 277-2224
Counsel for Respondents

* *Counsel of Record*

Petition For Certiorari Filed January 20, 1998
Certiorari Granted May 4, 1998

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

138 pp $10.-

INDEX

Chronological List of Relevant Docket Entries, United States District Court for the Central District of California, Los Angeles County Division 1

Plaintiffs' Complaint, Filed Nov. 19, 1993. 4

Defendants' Answer to Complaint, Filed Dec. 28, 1993 19

Defendants' Motion for Summary Judgment, Filed March 15, 1994 [face page] 26

Defendants' Statement of Uncontroverted Facts and Conclusions of Law, Filed March 15, 1994 [face page] 28

Declaration of David Melnyk 29

Defendants' Request and (Proposed) Order for Release of Property 32

Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, Filed March 28, 1994 [face page] 36

Excerpts of Deposition of Michael Ferrari 37

Defendants' Supplemental Memorandum Re Defendants' Motion for Summary Judgment, Filed April 27, 1994 [face page]. 42

Declaration of Michael Ferrari 43

Order [Granting Defendants' Motion for Summary Judgment, and Denying Plaintiffs' Motion for Summary Judgment], Filed May 10, 1994 ..... Pet. App. B1*

*Opinions, decisions, judgments, and orders which appear in the printed appendix to the petition for certiorari have not been reprinted in the Joint Appendix. The index references here are to the pages of Petitioner's Appendix.

INDEX – Continued

Plaintiffs' Notice of Motion and Motion to Amend Complaint or in the Alternative to Include the Claim in the Pretrial Conference Order, Filed June 9, 1994 47

Order, Filed July 6, 1994 57

Judgment, Filed Aug. 3, 1994 ..... Pet. App. C1

[Plaintiffs'] Second Notice of Appeal, Filed Aug. 31, 1994 65

Order of Ninth Circuit, Filed April 30, 1996 ..... Pet. App. D1

[Defendants'] Notice of Motion and Motion for Summary Judgment, Filed June 12, 1996 [face page] 67

Declaration of David D. Lawrence, Dated June 12, 1996 68

Declaration of Michael Ferrrari, Dated June 12, 1996 71

Defendants' Exhibit No. 1 – Excerpts of Deposition of Lawrence Perkins 72

Defendants' Exhibit No. 2 – Search Warrant Notice of Service 76

Defendants' Exhibit No. 3 – Declaration of Jeffrie Madland 77

Defendants' Exhibit No. 4 – Letter Dated Feb. 10, 1994 78

Defendants' Exhibit No. 5 – Request for Release of Property with Order for Release of Property Signed by Judge of Superior Court on June 17, 1994 80

INDEX – Continued

Defendants' Exhibit No. 6 – Letter Dated June 21, 1994 with Copy of Proposed Order 86

Defendants' Exhibit No. 7 – First Face Page of Search Warrant 92

[Plaintiffs'] Opposition to Motion for Summary Judgment; Motion for Summary Judgment, Filed June 17, 1996 [face page] 95

Plaintiffs' Exhibit A – Search Warrant 96

Excerpts of Deposition of Lawrence Perkins 101

Excerpts of Deposition of Clara Perkins 125

Excerpts of Deposition of Michael Ferrari 129

Order Granting Defendants' Motion for Summary Judgment, Filed June 25, 1996 ..... Pet. App. E1

Opinion of the Court of Appeals for the Ninth Circuit, Filed May 9, 1997 ..... Pet. App. A1

Order Denying Petition for Rehearing and Rejecting Suggestion for Rehearing En Banc, Filed Oct. 22, 1997 ..... Pet. App. F1

Order of the United States Supreme Court Granting the Petition for Certiorari and Granting Amicus Permission to File Brief in Support of the Petition, Dated May 4, 1998 133

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Nov. 19, 1993 – Plaintiffs' Complaint filed in U.S. District Court for Central District of California, Los Angeles County Division

Dec. 28, 1993 – Defendants' Answer to Complaint filed in U.S. District Court for Central District of California, Los Angeles County Division

March 15, 1994 – Defendants' Motion for Summary Judgment filed in U.S. District Court for Central District of California, Los Angeles County Division

March 15, 1994 – Defendants' Statement of Uncontroverted Facts and Conclusions of Law filed in U.S. District Court for Central District of California, Los Angeles County Division

March 28, 1994 – Plaintiffs' Opposition to Defendants' Motion for Summary Judgment filed in U.S. District Court for Central District of California, Los Angeles County Division

April 27, 1994 – Defendants' Supplemental Memorandum Re Defendants' Motion for Summary Judgment filed in U.S. District Court for Central District of California, Los Angeles County Division

May 10, 1994 – Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiffs' Motion for Summary Judgment filed in U.S. District Court for Central District of California, Los Angeles County Division

June 9, 1994 – Plaintiffs' Notice of Motion and Motion to Amend Complaint or in the Alternative to Include the Claim in the Pretrial Conference Order filed in U.S. District Court for Central District of California, Los Angeles County Division

July 6, 1994 – Order Granting West Covina's Motion for Summary Judgment filed in U.S. District Court for Central District of California, Los Angeles County Division

Aug. 3, 1994 – Judgment ordered in favor of all defendants filed in U.S. District Court for Central District of California, Los Angeles County Division

Aug. 31, 1994 – Plaintiffs' Second Notice of Appeal filed in U.S. District Court for Central District of California, Los Angeles County Division

April 30, 1996 – Order of Ninth Circuit remanding to District Court for clarification of status of bifurcated claim that West Covina violated due process filed in the Ninth Circuit Court of Appeals

June 12, 1996 – Defendants' Notice of Motion and Motion for Summary Judgment filed in U.S. District Court for Central District of California, Los Angeles County Division

June 17, 1996 – Plaintiffs' Opposition to Motion for Summary Judgment; Motion for Summary Judgment filed in U.S. District Court for Central District of California, Los Angeles County Division

June 25, 1996 – Order Granting Defendants' Motion for Summary Judgment filed in U.S. District Court for

Central District of California, Los Angeles County Division

Oct. 22, 1997 – Order Denying Petition for Rehearing and Rejecting Suggestion for Rehearing En Banc filed in the Ninth Circuit Court of Appeals

May 9, 1997 – Opinion of the Court of Appeals for the Ninth Circuit affirming District Court's grant of summary judgment to individual defendants and reversing summary judgment in favor of West Covina filed in the Ninth Circuit Court of Appeals

May 4, 1998 – Order of the United States Supreme Court granting the Petition for Certiorari and granting Amicus permission to file brief in support of the petition

PATRICK S. SMITH, Bar # 120220
EDWARD M. FOX, Bar #123075
KLASS, HELMAN & ROSS
11766 Wilshire Blvd., Suite 350
Los Angeles, California 90025
(310) 277-2224

Attorneys for Plaintiffs,
LAWRENCE PERKINS, CLARA PERKINS
AND APRIL PERKINS

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LAWRENCE PERKINS, CLARA PERKINS, APRIL PERKINS, minor, by and through her Guardian ad Litem, Lawrence Perkins, Plaintiffs, v. THE CITY OF WEST COVINA, a political subdivision of the State of California; DETECTIVE FERRARI; DETECTIVE MELNYK; LIEUTENANT SCHIMANSKI; THE COUNTY OF LOS ANGELES, a political subdivision of the State of California, and DOES 1 through 50, inclusive, Defendants.	Case No. CV93-7084 SVW (CTx) COMPLAINT FOR VIOLATION OF CIVIL RIGHTS (Filed Nov. 19, 1993)

Plaintiffs allege:

JURISDICTION AND VENUE

1. This action arises under the United States Constitution and the Civil Rights Act of 1871 [42 U.S.C. Section 1983] as hereinafter more fully appears. This court has jurisdiction under and by virtue of 28 U.S.C. Sections 1343 and 1331.

2. Venue is founded in this judicial district upon 28 U.S.C.

Section 1391 as the acts complained of ar[e] in this district.

PARTIES

3. At all times herein mentioned, plaintiffs, Lawrence Perkins ("Lawrence"), Clara Perkins ("Clara") and April Perkins ("April"), were, and now are, citizens of the United States, and reside within the jurisdiction of the United States District Court for the Central District of California.

4. At all times herein mentioned, defendant Detective Ferrari ("Ferrari") was duly appointed and acting as an officer for the City of West Covina, employed as such by the West Covina Police Department, and was at all material times acting under color of state law, and as the employee, agent and representative of every other defendant.

5. At all times herein mentioned, defendant Detective Melnyk ("Melnyk") was duly appointed and acting as an officer for the City of West Covina, employed as

such by the West Covina Police Department, and was at all material times acting under color of state law, and as the employee, agent and representative of every other defendant.

6. At all times herein mentioned, defendant Lieutenant Schimanski ("Schimanski") was duly appointed and acting as an officer for the City of West Covina, employed as such by the West Covina Police Department, and was at all material times acting under color of state law, and as the employee, agent and representative of every other defendant.

7. At all times herein mentioned, defendants City of West Covina and the County of Los Angeles were and are political subdivisions of the State of California existing as such under the laws of the State of California and the United States.

8. The true names or capacities of defendant Does 1 through 50 are unknown to plaintiffs who therefore sues such defendants by such fictitious names. Each defendant, Does 1 through 50, is responsible in some manner for the events herein referred to, and caused injuries and damages proximately thereby to plaintiffs, as herein alleged. Further, each of the Doe defendants was acting under color of state law as that term is defined in 42 U.S.C. Section 1983. Plaintiffs will amend this complaint to insert the true names and capacities of the fictitiously named defendants when ascertained.

FACTUAL ALLEGATIONS

9. On or about May 21, 1993, at approximately 9:00 a.m., plaintiffs lived at 531 Balham, La Puente, California, in the County of Los Angeles.

10. At said date, time and place, the defendant police officers and certain Does broke into the residence damaging the front door. There may have been no knock notice or other similar notice prior to the police entry by law enforcement.

11. The defendant deputies proceeded to search plaintiffs' house without such notice and without reasonable or probable cause. The deputies ransacked the house, destroying property, dumping and scattering plaintiffs' personal effects, and damaging and breaking items.

12. Further, items including money were unlawfully taken from the home and never returned to plaintiff's notwithstanding plaintiffs' repeated requests.

13. Plaintiffs in no way consented to defendants' conduct, but have protested the same. Defendants, and each of them, had no valid arrest or search warrant, or probable or legal cause to arrest the plaintiffs or search their home.

14. By reason of the above-described acts and omissions of defendants, and each of them, plaintiffs sustained injuries, including, but not limited to, humiliation and indignities, and physical, mental and emotional pain and suffering all to their damage in an amount to be ascertained. Plaintiffs have thus far incurred medical/psychological expenses in a sum to be ascertained.

15. The aforementioned acts of defendants were willful, wanton, malicious, oppressive, and done with reckless indifference to and/or callous disregard for plaintiffs' rights and justify the awarding of exemplary and punitive damages in an amount to be ascertained according to proof at the time of trial.

16. By reason of the above-described acts and omissions of defendants, plaintiffs were required to retain an attorney to institute, prosecute and render legal assistance to plaintiffs in the within action so that they might vindicate the loss and impairment of their rights. By reason thereof, plaintiffs request payment by defendants of a reasonable sum for attorney's fees pursuant to 42 U.S.C. Section 1988.

COUNT ONE

(Against Defendants Ferrari, Melnyk, Schimanski and Does 1 through 40, For Violation Of Civil Rights)

17. Plaintiffs hereby incorporate and reallege Paragraphs 1 through 16 hereat as though fully set forth at this place.

18. By reason of defendants' conduct, plaintiffs were deprived of rights, privileges, and immunities secured to them by the Fourth and Fourteenth Amendments of the Constitution of the United States and laws enacted thereunder.

19. The arbitrary intrusion by defendants, and each of them, into the security of plaintiffs' privacy was in violation of thier due process and liberty interests and not authorized by law, and was, therefore, in violation of

plaintiffs' Fourth and Fourteenth Amendment rights. Therefore, the individual defendants, and each of them, are liable to plaintiffs under 42 U.S.C. Section 1983.

COUNT TWO

(Against Defendants Ferrari, Melnyk, Schimanski and Does 1 through 40 For Violation of Civil Rights)

20. Plaintiffs hereby incorporate and reallege paragraphs 1 through 16 as though fully set forth at this place.

21. By reason of defendants' conduct, plaintiffs were deprived of rights, privileges, and immunities secured to them by the Fourth and Fourteenth Amendments of the Constitution of the United States and law enacted thereunder.

22. The defendants purportedly obtained a search warrant for the residence at 531 Balham, La Puente, California. Defendants had no probable or reasonable cause to request a search warrant. Plaintiffs are informed and believe and allege thereon that the affidavit for the search warrant contained material misrepresentations and/or omissions. Further, defendants may have given no knock notice, or other similar notice prior to searching, and the search conducted by defendants far exceeded the scope authorized under the warrant, and no warrant was shown to the plaintiffs, all of which was unnecessary, unreasonable and excessive and was, therefore, in violation of plaintiffs' Fourth Amendment rights. Therefore, the individual defendants, and each of them, are liable to plaintiffs under 42 U.S.C. Section 1983.

COUNT THREE

Against The City of West Covina, The County of Los Angeles and Does 41 through 50, For Violation Of Civil Rights)

23. Plaintiffs hereby incorporate and reallege Paragraphs 1 through 14 and 16, hereat as though fully set forth at this place.

24. Defendants, the City of West Covina, The County of Los Angeles, and Does 41 through 50, knowingly, with gross negligence, and in deliberate indifference to the Constitutional rights of citizens, maintain and permit an official policy and custom of permitting the occurrence of the types of wrongs set forth hereinabove and hereafter.

25. These policies and customs include, but are not limited to, the deliberately indifferent training of its officers in the execution of investigations, the execution of searches pursuant to search warrants, the procurement of search warrants and the failure to train officers in the prevention of fellow officers from violating the rights of citizens. These policies and customs also include the express and/or tacit encouragement of arrests without probable cause, the procurement of unlawful search warrants, unlawful searches pursuant to such warrants, the ratification of police misconduct and the failure to conduct adequate investigations of police misconduct such that future violations do not occur. Plaintiffs are informed and believe, and thereon allege, that the customs and policies were the moving force behind the violations of plaintiffs' rights. Based upon the principles set forth in *Monell v. New York City Dept. of Social Services*, the City of

West Convina, and the County of Los Angeles are liable for all of the injuries sustained by plaintiffs as set forth above.

WHEREFORE, plaintiffs request judgment as follows against defendants, and each of them:

1. That defendants be required to pay plaintiffs general damages including pain and suffering and emotional distress, in a sum to be ascertained;

2. That defendants be required to pay plaintiffs special damages, including but not limited to, lost wages, medical expenses and attorney fees in a sum to be ascertained;

3. That defendants, except the municipal defendants, be required to pay plaintiffs exemplary and punitive damages in a sum to be ascertained;

4. That defendants be required to pay plaintiffs' attorney's fees pursuant to Section 1988 of Title 42 of the United States Code;

5. That defendants be required to pay plaintiffs the costs of suit herein incurred; and

6. That plaintiffs have such other and further relief as the court may deem just and proper.

DATED: November 11, 1993

KLASS, HELMAN & ROSS

By /s/ Patrick S. Smith
PATRICK S. SMITH
Attorneys for Plaintiffs

NOTICE OF RIGHT TO CONSENT TO DISPOSITION OF A CIVIL CASE BY A UNITED STATES MAGISTRATE

PURSUANT TO GENERAL ORDER 194-G, NOTICE MUST BE SERVED WITH THE SUMMONS AND COMPLAINT ON ALL DEFENDANTS. ADDITIONAL COPIES OF THIS NOTICE HAVE BEEN PROVIDED FOR THAT PURPOSE.

In accordance with the provisions of 28 U.S.C. § 636(c), you are hereby notified that the full-time United States Magistrates of this District Court, in addition to their other duties, may, upon the consent of all parties to their civil case, conduct any and all proceedings in a civil case, including a jury or non-jury trial, and order the entry of a final judgment. Copies of appropriate consent forms for this purpose (Form number CV-II) are available from the Clerk of Court.

Your opportunity to have your case disposed of by a Magistrate is subject to the calendar requirements of the court. Accordingly, the district Judge to whom your case is assigned must approve the reference of the case to a Magistrate for disposition.

You should be aware that your decision to consent, or not to consent, to the referral of your case to a United States Magistrate for disposition is entirely voluntary and should be communicated solely to the clerk of the district court by submitting form number CV-11 after it has been completed. Only if all parties to the case consent to the reference to a Magistrate will either the Judge or Magistrate to whom the case has been assigned be informed of your decision.

The parties may stipulate to the designation of a specific Magistrate to conduct all further proceedings. A space is provided on the consent form for use by parties if they desire to stipulate to a specific Magistrate.

CV-20a 8/85 NOTICE OF G.O. 194-G

NOTE: The parties *may not* stipulate to the designation of a specific Magistrate in a case which has already been assigned to a Magistrate for a report and recommendation. If the case has been so assigned, it shall remain assigned to the assigned Magistrate. (General Order 194-G, 6.6.04.01).

Any appeal from a judgment of the Magistrate shall be taken to the United States Court of Appeal in the same manner as an appeal from any other judgment of the district court in accordance with 28 U.S.C. § 636(c)(3). In the alternative, in accordance with 28 U.S.C. § 636(c)(4), at the time of the reference to a Magistrate, the parties may further consent to appeal on the record to a judge of the district court in the same manner as on an appeal from a judgment of the district court to a court of appeals, subject to the limitation contained in 28 U.S.C. § 636(c)(5) which provides that cases appealed under 28 U.S.C. § 636(c)(4) "may be reviewed by the appropriate United States Court of Appeals upon petition for leave to appeal by a party stating specific objections to the judgment."

Form number CV-11 provides an opportunity for parties to designate their election of appellate alternatives under 28 U.S.C. § 636(c)(3) or 28 U.S.C. § 636(c)(4).

CLERK, UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NOTICE OF ASSIGNMENT TO UNITED STATES MAGISTRATE JUDGE

Pursuant to the Local Rules Governing Duties of Magistrate Judges, Magistrate Judge Carolyn Turchin has been designated to hear discovery motions in the within action at the discretion of the assigned District Judge.

Upon the filing of a discovery motion, the motion will be presented to the United States District Judge for consideration and may hereafter be referred to the Magistrate Judge for hearing and determination.

The Magistrate Judge's initials should be used on all documents filed with the Court so that the case number reads as follows:

CV-93 7084 SVW (CTx)

NOTE: A COPY OF THIS NOTICE MUST BE SERVED WITH THE SUMMONS AND COMPLAINT ON ALL DEFENDANTS.

NOTICE TO COUNSEL

THE COURT HAS DIRECTED THAT THE FOLLOWING RULES BE SPECIFICALLY CALLED TO YOUR ATTENTION.

I. Continuing Obligation to Report Related Cases (Local Rule 4)

II. Service of Papers and Process (Local Rule 5)

III. Notice of Right to Consent to Disposition of a Civil Case by a United States Magistrate (28 U.S.C. § 636(c). General Order 194-G)

I. CONTINUING OBLIGATION TO REPORT RELATED CASES

Counsel are reminded that you have the continuing obligation to promptly advise the Court whenever one or more civil actions or proceedings previously commenced and one or more currently filed appear to be related.

Local Rule 4.3.3 provides that, "It shall be the continuing duty of the attorney in any case promptly to bring to the attention of the Court, by the filing of a Notice of Related Case(s) pursuant to Local Rule 4.3.1, all facts which in the opinion of the attorney or party appear relevant to a determination whether such action and one or more pending actions should, under the criteria and procedures set forth in Local Rule 4.3, be heard by the same judge."

Local Rule 4.2.1 provides that, "It is not permissible to dismiss and thereafter re-file an action for the purpose of obtaining a different judge." Whenever an action is dismissed before judgment and thereafter the same or essentially the same action is re-filed, the latter action shall be assigned to the

judge to whom the first action was assigned. It shall be the continuing duty of every attorney appearing in such a re-filed action promptly to bring the facts of the matter to the attention of the Clerk in writing.

II. SERVICE OF PAPERS AND PROCESS

Local Rule 5.4 provides that "Except as otherwise provided by order of Court, or when required by the treaties or statutes of the United States, process shall not be presented to the United States Marshal for service." Service of process upon classes of persons identified FRCP 4(d)(1), (2), (3) and (6) shall be accomplished in any manner provided by State law including but not limited to service by private persons qualified to serve process under the Federal Rules of Civil Procedure (a person of suitable discretion at least 18 years of age). Service upon the United States, an officer or agency thereof, shall be served pursuant to the provisions of FRCP 4(d)(4) and (5). Service should be promptly made; unreasonable delay may result in a dismissal of the action under Local Rule 12. Proof of Service must be promptly filed with the Court.

For further information inquire at the Office of the Clerk, Civil Filing window.

PATRICK S. SMITH, Bar # 120220
EDWARD M. FOX, Bar #123075
KLASS, HELMAN & ROSS
11766 Wilshire Blvd., Suite 350
Los Angeles, California 90025
(310) 27/-2224

Attorneys for Plaintiffs,
LAWRENCE PERKINS, CLARA PERKINS
AND APRIL PERKINS

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LAWRENCE PERKINS, CLARA PERKINS, APRIL PERKINS, minor, by and through her Guardian ad Litem, Lawrence Perkins, Plaintiffs, v. THE CITY OF WEST COVINA, a political subdivision of the State of California; DETECTIVE FERRARI; DETECTIVE MELNYK; LIEUTENANT SCHIMANSKI; THE COUNTY OF LOS ANGELES, a political subdivision of the State of California, and DOES 1 through 50, inclusive, Defendants.	Case No. CV93-7084 SVW (CTx) ORDER FOR PETITION OF GUARDIAN AD LITEM

The petition of Larence Perkins for appointment as Guardian ad litem for April Perkins, a minor, was

considered by the Court on this date. On proof made to the satisfaction of the Court, the Court finds that the appointment is expedient and supported by good cause.

IT IS ORDERED that the petition of Larence Perkins be granted and that April Perkins is hereby appointed Guardian ad Litem for April Perkins, a minor.

DATED: 11/22/93

/s/ Stephen J. Helman
JUDGE OF THE
DISTRICT COURT

Submitted by:

KLASS, HELMAN & ROSS

By /s/ Patrick S. Smith
PATRICK S. SMITH
Attorneys for Plaintiffs

GEORGE J. FRANSCELL, State Bar No. 29183
DAVID D. LAWRENCE, State Bar No. 123039
FRANSCELL, STRICKLAND, ROBERTS & LAWRENCE
A Professional Corporation
225 South Lake Avenue, Penthouse
Pasadena, CA 91101-3005
Telephone No. (818) 304-7830

Attorneys for Defendants
CITY OF WEST COVINA, DETECTIVE FERRARI,
DETECTIVE NELNYK and
LIEUTENANT SCHIMANSKI

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LAWRENCE PERKINS, CLARA PERKINS, APRIL PERKINS, a minor, by and through her Guardian ad Litem, Lawrence Perkins, Plaintiffs, v. THE CITY OF WEST COVINA, a political subdivision of the State of California; DETECTIVE FERRARI; DETECTIVE MELNYK; LIEUTENANT SCHIMANSKI; the COUNTY OF LOS ANGELES, a political subdivision of the State of California, and DOES 1 through 50, inclusive, Defendants.	) No. CV 93 7084 SVW (CTx) ANSWER TO COMPLAINT; DEMAND FOR JURY TRIAL (Filed Dec. 28, 1993)

COME NOW defendants, CITY OF WEST COVINA, DETECTIVE FERRARI, DETECTIVE MELNYK and LIEUTENANT SCHIMANSKI, and answering the Complaint on file herein for themselves alone and for no other defendants, admit, deny and allege as follows:

1. Answering paragraphs 3, 7 and 9, these defendants admit the allegations contained therein.

2. Answering paragraphs 1, 2, 8, 10, 11, 12, 13, 18, 21, 22, 24 and 25, these defendants deny generally and specifically each and every allegation contained therein.

3. Answering paragraphs 14, 15, 16, and 19, these defendants deny generally and specifically each and every allegation contained therein. In addition thereto, these defendants deny that plaintiffs were injured or damaged in any sum or amount or at all by reason of any wrongful act or omission on their part.

4. Answering paragraphs 4, 5 and 6, these defendants admit the allegations contained therein except those allegations that they were the employee, agent and representative of every other defendant. As to this allegation, these defendants deny generally and specifically said allegation.

5. Answering paragraphs 17, 20 and 23, these defendants reiterate and incorporate its answers as previously contained in said answers to the Complaint.

FIRST AFFIRMATIVE DEFENSE

6. That the employees of defendant CITY OF WEST COVINA were at all times mentioned in plaintiffs' Complaint and now are duly qualified, appointed and acting

police officers of the CITY OF WEST COVINA and peace officers of the State of California and that at all times herein mentioned said employees were engaged in the performance of their regularly assigned duties as police officers.

SECOND AFFIRMATIVE DEFENSE

7. That the employees of defendant CITY OF WEST COVINA at all times herein mentioned acted in good faith, without malice and within the scope of their duties as police officers of the City of West Covina and peace officers of the State of California.

THIRD AFFIRMATIVE DEFENSE

8. That pursuant to Government Code § 818, as well as *Newport City v. Fact Concerts, Inc.*, 453 U.S. 247, 69 L.Ed.2d 616, 101 S.Ct. 2748 (1981), the City of West Covina is not liable for exemplary or punitive damages in any sum, or at all.

FOURTH AFFIRMATIVE DEFENSE

9. That any injury to plaintiffs was due to and caused by the negligence and omissions of the plaintiffs to care for themselves, which carelessness and negligence and omissions were the proximate cause of the damage, if any, to the plaintiffs.

FIFTH AFFIRMATIVE DEFENSE

10. That the actions of these answering defendants and its employees in all respects were reasonable, proper and legal.

SIXTH AFFIRMATIVE DEFENSE

11. Plaintiffs' Complaint fails to state a cause of action against defendants.

SEVENTH AFFIRMATIVE DEFENSE

12. That plaintiffs' Complaint fails to state a cause of action against these defendants for the reason that the entering on to the premises and inside were pursuant to a valid search warrant.

EIGHTH AFFIRMATIVE DEFENSE

13. Neither a public employee nor a public entity is liable for any injury caused by the act or omission of another person.

NINTH AFFIRMATIVE DEFENSE

14. Neither a public entity nor a public employee is liable for any injury caused by the institution or prosecution of any judicial proceedings within the scope of the public employee's employment.

TENTH AFFIRMATIVE DEFENSE

15. That plaintiffs' Complaint fails to state a cause of action against these defendants for, pursuant to *Monell v. Department of Social Services of the City of New York* (1978) 56 L.Ed.2d 611, there can be no recovery for a federal civil rights violation where there is no constitutional deprivation occurring pursuant to governmental custom.

ELEVENTH AFFIRMATIVE DEFENSE

16. These defendants are immune from liability pursuant to the Federal Civil Rights Act where they reasonably believed that their actions were lawful.

TWELFTH AFFIRMATIVE DEFENSE

17. That plaintiffs' Complaint does not state facts sufficient to constitute a cause of action against these defendants or any defendant herein, because simple negligence pursuant to the United States Supreme Court decision of *Parratt v. Taylor,* is not a Federal Civil Rights violation.

THIRTEENTH AFFIRMATIVE DEFENSE

18. That plaintiffs' Complaint fails to state facts sufficient to constitute a cause of action against these defendants for the reason that they are entitled to qualified immunity from this suit.

FOURTEENTH AFFIRMATIVE DEFENSE

19. That the damages, if any, should be in direct proportion to the fault of these defendants, if any, as provided by Civil Code §§ 1431 to 1431.5.

FIFTEENTH AFFIRMATIVE DEFENSE

20. Plaintiffs' Complaint fails to state a cause of action against these defendants for punitive damages in that punitive damages violate these defendants' due process of law rights.

SIXTEENTH AFFIRMATIVE DEFENSE

21. An award of punitive damages violates these defendants' due process of law rights.

WHEREFORE, defendants CITY OF WEST COVINA, DETECTIVE FERRARI, DETECTIVE MELNYK and LIEUTENANT SCHIMANSKI pray that plaintiffs take nothing by way of their Complaint and that defendants herein recover their costs and such other and further relief as the Court may deem just and proper.

DEMAND FOR JURY TRIAL

PLEASE TAKE NOTICE that defendants, CITY OF WEST COVINA, DETECTIVE FERRARI, DETECTIVE MELNYK and LIEUTENANT SCHIMANSKI, demand a trial by jury pursuant to Federal Rules of Civil Procedure, Rule 38(b) and Local Rule 3.4.10.1.

Date: December 27, 1993.

FRANSCELL, STRICKLAND,
ROBERTS & LAWRENCE

By /s/ George J. Franscell
George J. Franscell
Attorney for Defendants
CITY OF WEST COVINA,
DETECTIVE FERRARI,
DETECTIVE MELNYK and
LIEUTENANT SCHIMANSKI

[PROOF OF SERVICE Omitted In Printing]

DAVID D. LAWRENCE, State Bar No. 123039
SHERRY L. HOVIND, State Bar No. 151795
FRANSCELL, STRICKLAND, ROBERTS & LAWRENCE
A Professional Corporation
225 South Lake Avenue, Penthouse
Pasadena, CA 91101-3005
Telephone No. (818) 304-7830

Attorneys for Defendants
CITY OF WEST COVINA, DETECTIVE MICHAEL FERRARI, DETECTIVE DAVID MELNYK, DETECTIVE DAN NALIAN, DETECTIVE DARIO ALDECOA, DETECTIVE JAMES O'BRIEN, DETECTIVE WAYNE HEIECK and LT. JOHN SCHIMANSKI

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LAWRENCE PERKINS, CLARA PERKINS, APRIL PERKINS, a minor, by and through her Guardian ad Litem, Lawrence Perkins, Plaintiffs, v. THE CITY OF WEST COVINA, a political subdivision of the State of California; DETECTIVE FERRARI; DETECTIVE MELNYK; LIEUTENANT SCHIMANSKI; THE COUNTY OF LOS ANGELES, a political subdivision of the State of California, and DOES 1 through 50, inclusive, Defendants.	) No. CV [illegible] 7084 SVW ([illegible]Tx))) **DEFENDANTS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**)) **[Defendants' Statement of Uncontroverted Facts and Conclusions of Law, Declarations and Proposed Order filed**

Concurrently Herewith]

DATE: April 11, 1994
TIME: 1:30 p.m.
CTRM: 6

Motion Cut-off:
Discovery Cut-Off:
Trial: None

(Filed Mar. 15, 1994)

* * *

DAVID D. LAWRENCE, State Bar No. 123039
SHERRY L. HOVIND, State Bar No. 151795
FRANSCELL, STRICKLAND, ROBERTS & LAWRENCE
A Professional Corporation
225 South Lake Avenue, Penthouse
Pasadena, CA 91101-3005
Telephone No. (818) 304-7830

Attorneys for Defendants
CITY OF WEST COVINA, DETECTIVE MICHAEL FERRARI, DETECTIVE DAVID MELNYK, DETECTIVE DAN NALIAN, DETECTIVE DARIO ALDECOA, DETECTIVE JAMES O'BRIEN, DETECTIVE WAYNE HEIECK and LT. JOHN SCHIMANSKI

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LAWRENCE PERKINS, CLARA PERKINS, APRIL PERKINS, a minor, by and through her Guardian ad Litem, Lawrence Perkins, Plaintiffs, v. THE CITY OF WEST COVINA, a political subdivision of the State of California; DETECTIVE FERRARI; DETECTIVE MELNYK; LIEUTENANT SCHIMANSKI; THE COUNTY OF LOS ANGELES, a political subdivision of the State of California, and DOES 1 through 50, inclusive, Defendants.	No. CV 93 7084 SVW (CTx) **DEFENDANTS' STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW; DECLARATIONS OF MICHAEL FERRARI, DAVID MELNYK, DAN NALIAN, DARIO ALDECOA, JAMES O'BRIEN, WAYNE HEIECK AND SHERRY L. HOVIND; EXHIBITS**

[Local Rule 7.14.1]

[Filed Concurrently With Defendants' Notice of Motion and Motion for Summary Judgment and [Proposed] Judgment]

DATE: April 11, 1994
TIME: 1:30 p.m.
CTRM: 6

Motion Cut-off: None
Discovery Cut-Off: None
Trial: None

(Filed Mar 15, 1994)

* * *

DECLARATION OF DAVID MELNYK

I, DAVID MELNYK, do hereby declare:

1. I am a detective with the West Covina Police Department and have been a peace officer since 1978. Unless otherwise stated, the following is of my own personal knowledge and if called upon to testify thereto, I would do so.

2. I am aware that I am a defendant in *Perkins v. City of West Covina, et al.*, Case No. CV 93 7084 SVW (CTx). I understand that this lawsuit pertains to the preparation of a search warrant and the execution of that search warrant at the plaintiffs' home on or about May 21, 1993.

3. On May 18, 1993, while on duty as a detective with the West Covina Police Department, I learned that a male later identified as Julio Alberto Clark had been shot and killed within the City of West Covina. I assisted my partner, defendant West Covina Police Department Detective Michael Ferrari, in the investigation of this homicide.

4. On May 18, 1993, Marcus Marsh, a.k.a., Marcus Winter, became a suspect in the murder of Julio Alberto Clark and other crimes.

5. On May 18, 1993, witness Lashaun McDuffy told me that Marcus Winter was her boyfriend and that his telephone number was (818) 854-1069. I traced the foregoing telephone number to plaintiffs' address at 531 Balham Avenue in La Puente.

6. My deposition was taken in this matter on February 22, 1994. During such deposition, I was asked what I had done during our investigation to ascertain that Marcus Marsh, a.k.a. Marcus Winter, lived at plaintiffs' residence at 531 Balham Avenue in La Puente. I stated that I had conducted computer checks of various records regarding Marcus Marsh and found items listing Mr. Marsh's address as 531 Balham Avenue. At the time of the deposition, I believed the foregoing to be true and correct.

7. Following my deposition, however, I reviewed the file in this case and realized that the foregoing portion of my testimony was in error. Notes contained in the file refreshed my recollection and I now recall that West Covina Police Department Officer Arthur Marinello informed me that he had spoken to Mr. Marsh's probation officer who had informed him that Mr. Marsh's most recent address was 531 Balham Avenue in La Puente. I also found documents in Mr. Marsh's Cadillac which identified his address as 531 Balham Avenue. I relayed this information to Detective Michael Ferrari.

8. I am informed and believe that on May 20, 1993, defendant Detective Michael Ferrari obtained a search warrant authorizing a search of plaintiffs' residence located at 531 Balham Avenue in La Puente from the Honorable Dan Thomas Oki of the Citrus Municipal Court.

9. On or about May 21, 1993, I assisted in supervising the officers who served and executed such search warrant at 531 Balham Avenue in La Puente. Prior to arriving at plaintiffs' residence, I had reviewed the search warrant. I was fully aware of what items it authorized officers to search for and assisted in supervising the officers who searched for those items.

10. It is the practice of the West Covina Police Department to conduct all premises searches in a reasonable manner without any unnecessary destruction of or damage to property. It is also the practice of the West Covina Police Department to consult the Search Warrant Manual drafted by the Los Angeles County District Attorney's Office regarding searches. I personally consult such

Manual and consider it to be authoritative source on legal issues regarding searches. Insofar as the return property seized during a search, I have relied upon pages 129-130 of such Manual, true and correct copies of which are attached hereto as Exhibit "4".

11. While supervising officers conducting the search, I did not intentionally damage or destroy any property. If I did cause any damage to property, it was inadvertent. I do not, however, have any recollection of damaging or destroying any property during the course of searching plaintiffs' residence and did not observe any other West Covina Police Department officer damage or destroy any property during the course of such search.

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct. Executed this 14TH day of March, 1994, at West Covina, California.

/s/ David Melnyk
DAVID MELNYK

SHERRY L. HOVIND, State Bar No. 151795
FRANSCELL, STRICKLAND, ROBERTS & LAWRENCE
A Professional Corporation
225 South Lake Avenue, Penthouse
Pasadena, CA 91101-3005
Telephone No. (818) 304-7830

Attorneys for CITY OF WEST COVINA, DETECTIVE DAVE FERRARI, DETECTIVE MIKE MELNYK,

DETECTIVE DAN NALIAN, DETECTIVE DARIO ALDECOA, DETECTIVE JAMES O'BRIEN, DETECTIVE WAYNE HEIECK and LT. JOHN SCHIMANSKI in Case No. CV 93 7084 SVW (CTx)

LOS ANGELES COUNTY MUNICIPAL COURT

CITRUS JUDICIAL DISTRICT

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. MARCUS MARSH, Defendant.	)	Case No. KA018341 **REQUEST AND [PROPOSED] ORDER FOR RELEASE OF PROPERTY**

I. REQUEST FOR RELEASE OF PROPERTY

Items were seized pursuant to Search Warrant No. J4286 from the premises described as the residence located at 531 Balham Avenue, City of La Puente, County of Los Angeles, further described as a single family residential dwelling with a detached garage, tan stucco walls, brown wood trim, and a rock roof. The front door faces east and the numbers 531 are next to the front door. The items seized are being retained in police custody pursuant to *Penal Code* Section 1536.

Petitioner seeks the release of certain of these items from police custody for purposes of disposition of them. The items for which release is sought are:

1. $2,469.00 in United States currency;

2. A starter pistol;

3. A 12-gauge shotgun as described as Item No. 6 on the West Covina Police Department Property Inventory Sheet, attached hereto as Exhibit "A";

4. One black case, although police will continue to retain the ammunition located within it, as described as Item No. 15 on the West Covina Police Department Property Inventory Sheet, attached hereto as Exhibit "A";

5. One soft gun case with black plastic grip as described as Item No. 17 on the West Covina Police Department Property Inventory Sheet, attached hereto as Exhibit "A";

6. Miscellaneous papers and phone books in the names of C. Perkins and L. Perkins as described as Item No. 13 on the West Covina Police Department Property Inventory Sheet, attached hereto as Exhibit "A".

These items were seized in connection with the above entitled case but are no longer needed for the following reason:

Further investigation has led to the conclusion that these items will not be used as evidence in the pending criminal prosecution against Marcus Marsh, a.k.a. Marcus Winter for homicide.

The proposed disposition of these items upon release to petitioner is as follows:

Please permit the owners of such property, Clara Mae Perkins or Lawrence Perkins, or their attorneys, Klass, Helman & Ross, to retrieve such items.

WHEREFORE, petitioner seeks the release of said items.

I swear under penalty of perjury the foregoing is true and correct to the best of my information and belief.

Date: March 1, 1994

FRANSCELL, STRICKLAND, ROBERTS & LAWRENCE

By /s/ Sherry L. Hovind
SHERRY L. HOVIND

Attorney for Defendants CITY OF WEST COVINA, DETECTIVE DAVE FERRARI, DETECTIVE MIKE MELNYK, DETECTIVE DAN NALIAN, DETECTIVE DARIO ALDECOA, DETECTIVE JAMES O'BRIEN, DETECTIVE WAYNE HEIECK and LT. JOHN SCHIMANSKI in Case No. CV 93 7084 SVW (CTx)

ORDER FOR RELEASE OF PROPERTY

TO THE WEST COVINA POLICE DEPARTMENT:

Good cause having been shown, it is ordered that the items described above be released from policy custody into the custody of Clara Mae Perkins or Lawrence Perkins, or their attorneys, Klass, Helman & Ross.

DATED: _____

_____

DAN THOMAS OKI
JUDGE OF THE LOS ANGELES
COUNTY MUNICIPAL COURT

[Proof Of Service Omitted In Printing]

PATRICK S. SMITH, Bar # 120220
EDWARD M. FOX, Bar # 123075
KLASS, HELMAN & ROSS
11766 Wilshire Blvd., Suite 350
Los Angeles, California 90025
(310) 277-2224

Attorneys for Plaintiffs,
LAWRENCE PERKINS, CLARA PERKINS
AND APRIL PERKINS

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LAWRENCE PERKINS, CLARA PERKINS, APRIL PERKINS, minor, by and through her Guardian ad Litem, Lawrence Perkins, Plaintiffs, v. THE CITY OF WEST COVINA, a political subdivision of the State of California; DETECTIVE FERRARI; DETECTIVE MELNYK; LIEUTENANT SCHIMANSKI; THE COUNTY OF LOS ANGELES, a political subdivision of the State of California, and DOES 1 through 50, inclusive, Defendants.	Case No. CV93-7084 SVW (CTx) OPPOSITION TO MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; DECLARATION OF LAWRENCE PERKINS (Filed March 28, 1994) DATE: April 11, 1994 TIME: 1:30 p.m. CTRM: 6 MOTION CUT-OFF: None DISCOVERY CUT-OFF: None TRIAL: None Set

Plaintiffs, Lawrence Perkins, Clara Perkins, and April Perkins, hereby file their Opposition to the defendants' Motion for Summary Judgment

Dated: March 28, 1994 KLASS, HELMAN & ROSS

By /s/ Patrick S. Smith
PATRICK S. SMITH

* * *

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LAWRENCE PERKINS, CLARA PERKINS, APRIL PERKINS, MINOR, BY AND THROUGH HER GUARDIAN AD LITEM, LAWRENCE PERKINS, PLAINTIFFS, VS. THE CITY OF WEST COVINA, A POLITICAL SUBDIVISION OF THE STATE OF CALIFORNIA; DETECTIVE FERRARI; DETECTIVE MELNYK; LIEUTENANT SCHIMANSKI; THE COUNTY OF LOS ANGELES, A POLITICAL SUBDIVISION OF THE STATE OF CALIFORNIA, AND DOES 1 THROUGH 50, INCLUSIVE, DEFENDANTS.	NO. CV93-7084 SVW (CTX)

DEPOSITION OF MICHAEL FERRARI

TAKEN ON

TUESDAY, FEBRUARY 22, 1994

REPORTED BY: VICTORIA MELEKIAN

CSR NO. 6996

* * *

[p. 77] PERKINS, DID YOU, IN BETWEEN THOSE TWO PERIODS, EVER TALK TO A SUPERVISOR CONCERNING THE RETURN OF ANY OF PERKINS' PROPERTY?

A. I DON'T BELIEVE IT WAS AT THAT TIME THAT I SPOKE TO A SUPERVISOR.

Q. APPROXIMATELY A WEEK AFTER YOU FIRST SPOKE WITH MR. PERKINS, YOU, AGAIN HAD COMMUNICATION WITH HIM; IS THAT RIGHT?

A. CORRECT.

Q. DID HE COME TO THE STATION?

A. I BELIEVE HE DID.

Q. DID HE BRING WITH HIM RECEIPTS?

A. YES.

Q. AT THAT TIME YOU TOLD HIM HOW TO GO ABOUT GETTING A COURT ORDER TO GET HIS PROPERTY BACK; IS THAT RIGHT?

A. CORRECT.

Q. DID YOU TALK TO ANY SUPERVISOR ON THAT SUBJECT, MR. PERKINS GETTING HIS PROPERTY BACK BY A COURT ORDER AT ANY TIME AFTER THIS MEETING A WEEK AFTER THE EXERCISE OF

THE WARRANT WHERE HE CAME IN AND HE SHOWED YOU HIS THINGS?

A. I BELIEVE AFTER THE SECOND MEETING, MR. PERKINS CONTINUED TO CALL BACK BECAUSE HE HAD SOME PROBLEMS WITH GETTING A COURT ORDER. I [p. 78] BELIEVE THERE WAS A POINT IN TIME WHERE I WENT TO MY SERGEANT AND EXPLAINED THAT HE MAY BE GETTING A CALL FROM MR. PERKINS BECAUSE HE WAS NOT HAPPY WITH ME.

Q. DID MR. PERKINS INDICATE TO YOU WHAT PROBLEMS HE WAS HAVING GETTING THE COURT ORDER?

A. YES, HE DID.

Q. WHAT DID HE SAY?

A. HE SAID THERE WAS NO CASE FILED AND THAT HE COULD NOT GET A COPY OF THE SEARCH WARRANT.

Q. DID YOU OFFER TO PROVIDE HIM WITH A COPY OF THE WARRANT?

A. NO, I DID NOT.

Q. WHEN MR. PERKINS TOLD YOU HE WAS HAVING DIFFICULTY BECAUSE HE COULDN'T GET A COPY OF THE WARRANT AND THERE WAS NO CASE FILED, WHAT INFORMATION OR COMMUNICATION DID YOU HAVE WITH MR. PERKINS ON THE SUBJECT OF GETTING HIS PROPERTY BACK?

A. I GOT A LITTLE MIXED UP IN TIMES. HE INITIALLY CAME BACK AND SAID HE COULD NOT

FIND ANY RECORD OF THE CASE BEING FILED WHICH WAS CORRECT, THERE WAS NO CASE FILED AT THAT POINT IN TIME. THERE WAS A SEARCH WARRANT RETURN DONE, BUT WE HAD [p. 79] THE SEARCH WARRANT SEALED BECAUSE WE WERE STILL IN THE MIDST OF AN INVESTIGATION SO IT WAS AT THAT POINT IN TIME I TOLD HIM TO GO SEE JUDGE OKI WHO HAD SIGNED THE ORIGINAL SEARCH WARRANT SINCE HE WAS UNABLE TO LOCATE ANY CASE NUMBER TO GET ON CALENDAR.

Q. AND DID YOU HAVE A SUBSEQUENT COMMUNICATION WITH HIM WHEN HE INDICATED HE ATTEMPTED TO CONTACT JUDGE OKI?

A. YES.

Q. WHAT DID HE SAY TO YOU, AND WHAT DID YOU SAY TO HIM?

A. HE SAID JUDGE OKI WAS ON VACATION AND THAT HE WOULD BE GONE A WEEK OR TWO AND IT WAS AT THAT POINT I TOLD HIM THAT I DIDN'T KNOW WHAT MORE I COULD DO TO HELP HIM AND HE MAY WANT TO RETAIN AN ATTORNEY TO HELP HIM GET A COURT ORDER TO GET HIS PROPERTY.

Q. IS THAT WHEN YOU INFORMED YOUR SERGEANT THAT MAYBE MR. OKI – EXCUSE ME – MR. PERKINS MIGHT BE CONTACTING THE SERGEANT?

A. I BELIEVE SO.

Q. AND IS THAT BECAUSE – STRIKE THAT.

IN ANY CONVERSATION THAT YOU HAD WITH MR. PERKINS PRIOR TO THE FILING OF THIS CASE, AND

* * *

DAVID D. LAWRENCE, State Bar No. 123039
SHERRY L. HOVIND, State Bar No. 151795
FRANSCELL, STRICKLAND, ROBERTS & LAWRENCE
A Professional Corporation
225 South Lake Avenue, Penthouse
Pasadena, CA 91101-3005
Telephone No. (818) 304-7830

Attorneys for Defendants
CITY OF WEST COVINA, DETECTIVE MICHAEL FERRARI, DETECTIVE DAVID MELNYK, DETECTIVE DAN NALIAN, DETECTIVE DARIO ALDECOA, DETECTIVE JAMES O'BRIEN, DETECTIVE WAYNE HEIECK and LT. JOHN SCHIMANSKI

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LAWRENCE PERKINS, CLARA PERKINS, APRIL PERKINS, a minor, by and through her Guardian ad Litem, Lawrence Perkins, Plaintiffs, v. THE CITY OF WEST COVINA, a political subdivision of the State of California; DETECTIVE FERRARI; DETECTIVE MELNYK; LIEUTENANT SCHIMANSKI; THE COUNTY OF LOS ANGELES, a political subdivision of the State of California, and DOES 1 through 50, inclusive, Defendants.	No. CV 93 7084 SVW (CTx) **DEFENDANTS' SUPPLEMENTAL MEMORANDUM RE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT; DECLARATION OF MICHAEL FERRARI** **DATE: Under Submission** **TIME: Not Applicable** **CTRM: 6** **MOT. CUT-OFF: NONE**

DIS. CUT-OFF: NONE
TRIAL: JUNE 7, 1994

(Filed Apr. 27, 1994)

* * *

DECLARATION OF MICHAEL FERRARI

I, MICHAEL FERRARI, state and declare as follows:

1. I am a Detective with the West Covina Police Department. Unless otherwise stated, the following is of my own personal knowledge and if called upon to testify thereto, I would do so.

2. As stated in my prior declaration, I prepared an Affidavit and Search Warrant for the search of the Perkins' residence located at 531 Balham Avenue, La Puente, California. A true and correct copy of the Affidavit and Search Warrant are attached to my Declaration dated March 14, 1994 as Exhibit "1". On May 20, 1993, I obtained the signature of the Honorable Dan Thomas Oki of the Citrus Municipal Court for the search warrant.

3. On May 21, 1993, I assisted in the service of the aforementioned search warrant at the 531 Balham address. The search warrant did not specifically authorize the seizure of cash. During the course of the search, I was advised that $2,469.00 in cash had been located in a closet at the Balham residence. At the time the search was being conducted, I possessed the following information:

(a) The primary suspect in the homicide investigation was an individual known as Marcus Marsh.

(b) Marcus Marsh was known to be a Crip gang member.

(c) Crip gang members are known to be involved in illegal drug sales.

(d) We were advised that Marcus Marsh was the boyfriend of Lashaun McDuffy.

(e) We were advised that Marcus Marsh would sometimes stay at the residence of Lashaun McDuffy and sometimes at the Perkins' residence.

(f) On May 18, 1993, a search of Lashaun McDuffy's home was conducted and evidence of illegal drug trafficking was located, i.e., rock cocaine, $949.00 in currency, three pagers, one of which was displaying that it was full of 36 phone numbers, 32 caliber ammunition, and a photo album depicting gang members displaying gang hand signs. Other evidence indicating the presence of gang members and criminal activity was located at the Lashaun McDuffy residence as set forth in the Affidavit in support of Search Warrant which was attached as Exhibit "1" to my March 14, 1994 Declaration.

4. Attached hereto as Exhibits "6", "7", and "8" are photographs which depict the front of the Perkins' residence located at 531 Balham. The Perkins' residence is a fairly small, older single family residence in what I would describe as a middle to lower income neighborhood. Upon entry of the Perkins' residence, I observed that the

condition of the interior of the house as well as its furnishings were consistent with what I would describe as a lower income level family.

5. In addition to locating the currency at the Perkins' residence, we also located paperwork in the name of Marcus Marsh, gang photos on the kitchen table, gang photos in the southwest bedroom, various types of ammunition and a shotgun. In light of the fact that we had information and evidence of drug trafficking at the Lashaun McDuffy residence, the fact that Marcus Marsh was a gang member and lived part time at the McDuffy residence and part time at the Perkins' residence, the fact that we found evidence of gang membership at the Perkins' residence and ammunition, it seemed likely to me that the $2,469.00 in cash was evidence of criminal activity, most likely, drug trafficking. It is well known that large sums of cash are consistent with illegal drug trafficking since such purchases typically occur through cash transactions. Furthermore, it seemed less likely to me that the cash would be consistent with non-criminal behavior given that it was found in a home apparently occupied by individuals at a low income level.

6. When the aforementioned Search Warrant was obtained from Judge Oki, the search warrant was sealed. Following the search of the Perkins' residence, I filed the Search Warrant and the Return of Search Warrant with the criminal clerk of the Citrus Municipal Court. Even though the Search Warrant was sealed, it was listed in the register with the criminal clerk by the address where the search occurred, the number of the search warrant and the date of the return. To my knowledge, the clerk's

register is a public document which can be viewed by anyone who so requests.

7. Following the search of the Perkins' residence, I spoke with Lawrence Perkins and advised him that the search warrant had been signed by Judge Oki of the Citrus Municipal Court and that Mr. Perkins could obtain a release of his property from Judge Oki. I believe that when I spoke with Mr. Perkins that I provided him with the number of the search warrant which he could use in identifying the search warrant with Judge Oki when he requested return of his property. Even if he did not have the number of the search warrant, he could still identify the warrant for Judge Oki through the register maintained by the clerk of the Citrus Municipal Court. Furthermore, when I spoke with Lawrence Perkins, he was aware that our investigation pertained to Marcus Marsh. Consequently, once a criminal proceeding was commenced against Mr. Marsh, Mr. Perkins would know the identity of the case to which the search warrant pertained, i.e., *People v. Marcus Marsh.*

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 26 day of April, 1994 at West Covina, California.

/s/ Michael Ferrari
MICHAEL FERRARI

PATRICK S. SMITH, Bar # 120220
EDWARD M. FOX, Bar # 123075
KLASS, HELMAN & ROSS
11766 Wilshire Blvd., Suite 350
Los Angeles, California 90025
(310) 277-2224

Attorneys for Plaintiffs,
LAWRENCE PERKINS, CLARA PERKINS
AND APRIL PERKINS

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LAWRENCE PERKINS, CLARA PERKINS, APRIL PERKINS, minor, by and through her Guardian ad Litem, Lawrence Perkins, Plaintiffs, v. THE CITY OF WEST COVINA, a political subdivision of the State of California; DETECTIVE FERRARI; DETECTIVE MELNYK; LIEUTENANT SCHIMANSKI; THE COUNTY OF LOS ANGELES, a political subdivision of the State of California, and DOES 1 through 50, inclusive, Defendants.	) Case No. CV93-7084 SVW (CTx))) NOTICE OF MOTION) AND MOTION TO) AMEND) COMPLAINT, OR IN) THE ALTERNATIVE,) TO INCLUDE THE) CLAIM IN THE) PRETRIAL) CONFERENCE) ORDER;) MEMORANDUM OF) POINTS AND) AUTHORITIES;) DECLARATION OF) PATRICK S. SMITH)) (Filed June 9, 1994)) [Hearing to be set]

[Lodged concurrently with Ex Parte Application to Shorten Time]

PRE-TRIAL DATE: 6-13-94
TRIAL DATE: 6-14-94

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on _____, 1994 at 4:00 p.m. in the Courtroom of the Honorable Stephen v. Wilson of the above-entitled Court located at 317 N. Spring Street, Los Angeles, California, plaintiffs will move to amend the complaint, or, in the alternative, to include the Procedural Due Process claim in the Pretrial Conference Order.

The grounds for this Motion are fully set forth in Plaintiff's Memorandum of Points and Authorities attached hereto,

Plaintiff's Motion is based upon this Notice of Motion and Motion, the Memorandum of Points and Authorities filed herewith, the Declaration of Patrick S. Smith, on all other documentary evidence filed herewith, and on any oral presentation made before this Court.

DATED: June 8, 1994

Respectfully submitted,

KLASS, HELMAN & ROSS

By /s/ Patrick S. Smith
PATRICK S. SMITH
Attorneys for Plaintiffs

MEMORANDUM OF POINTS AND AUTHORITIES

I

PRELIMINARY STATEMENT

As the court knows, plaintiffs' complaint centers around an alleged unlawful search of the plaintiffs' residence and seizure of certain property from that residence. On May 9, 1994, this court issued its ORDER on the parties' cross-motions for summary judgment. In that Order, the court, *sua sponte*, found "that the facts, as currently presented by plaintiffs, may form the basis of a Due Process challenge, a cause of action not currently raised by plaintiffs' complaint." The court also requested supplemental briefing on certain issues, "[i]f plaintiffs intend to amend the complaint to include a Procedure Due Process challenge. . . . " The plaintiffs expressed their intent to amend the complaint by filing their supplemental brief.

Having recognized the deficiency in their complaint, as pointed out by the court, plaintiffs now move for an order allowing a Procedural Due Process challenge to be included in the complaint, or, in the alternative, that the court allow plaintiffs to include the issue in the Pretrial Conference Order.[1]

---

[1] Plaintiffs believe that their alternative request, i.e., to include the issue in the Pretrial Conference Order, is the most expeditious and appropriate avenue for bringing the claim into the case. In the interest of preserving this court's time, the plaintiffs have not submitted a proposed amended complaint, but respectfully refer the court to the [Proposed] Pretrial Conference Order for the proposed statement of the issue. See, Proposed Pre-Trial Conference Order, a copy of which is attached hereto as Exhibit "A."

II

STATEMENT OF FACTS

The facts are stated in the court's order of May 9, 1994. See Order, attached hereto as Exhibit "B."

The operative facts, as stated in plaintiffs' complaint, which form the basis for their claims under 42 U.S.C. §1983 also established a cause of action for a violation of Procedure Due Process, also under 42 U.S.C. §1983. Plaintiffs seek relief to include this legal theory in the Pretrial Conference Order based on the fact that the City of West Covina currently has no procedure for a non-defendant to retrieve items seized under a search warrant. Such claim is based on the same set of facts as are pled in the original complaint, thus the theory arises out of the same operative facts. This, of course, was recognized by the court in its Order on the cross-motions for summary judgment. See, Exhibit "B," page 5:15-28.

III

IT IS THE POLICY OF THE COURT TO LIBERALLY PERMIT THE AMENDMENT OF PLEADINGS ESPECIALLY WHERE AN ADDITIONAL CAUSE OF ACTION ARISES FROM THE SAME OPERATIVE FACTS ALREADY PLED.

Motions to Amend are freely granted where no prejudice results to the opposing party. Fed.R.Civ.P. 15(a) provides: "Leave *shall be freely given* when justice so requires." (Emphasis added). The Supreme Court, in its opinion in *Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227 (1962), enunciated the following general standard, which is to be employed under Rule 15(a) by the district courts:

> "If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be 'freely given.' "

Id., 371 U.S. 178, 182, 83 S.Ct. 227, 230 (1962).

The seminal case in the Ninth Circuit, interpreting *Foman*, is *Howey v. United States*, 481 F.2d 1187 (9th Cir. 1973). In *Howey*, the district court denied a motion to amend. The motion to amend had been made five years after the complaint had been filed. The Ninth Circuit reversed. In doing so, the court observed as follows:

> "where there is a lack of prejudice to the opposing party and the amended complaint is obviously not frivolous, or made as a dilatory maneuver in bad faith, it is an abuse of discretion to deny such a motion."

Howey at 1191. The court further observed that *"[o]nly* where prejudice is shown or the movant acts in bad faith are courts protecting the judicial system . . . when they deny leave to amend a pleading." *Id.* See also, *Hurn v. Retirement Fund Trust of Plumbing, Heating & Piping Industry*, 648 F.2d 1252 (9th Cir. 1981); *International Association of Machinists and Aerospace Workers v. Republic Airlines*, 761 F.2d 1386 (9th Cir. 1985); *Poling v. Morgan*, 829 F.2d 882 (9th Cir. 1987).

Moreover, Fed.R.Civ.P. Rule 15(c) states, in part, that:

> "An amendment of a pleading relates back to the date of original pleading when (2) the claims . . . asserted in the amended pleading arose out of the conduct, transactions, or occurrence set forth or attempted to be set forth in the original pleading,. . . . '

In short, there exists a "strong policy permitting amendments" in the Ninth Circuit.

In the instant action, plaintiffs have moved as promptly as possible with regard to requesting this amendment to add the appropriate cause of action with regard to the Procedural Due Process claim. Upon receipt of the Court's Order on the cross-motions for summary judgment, and after a review of the Complaint and the underlying facts, and, finally, after researching the issues brought to their attention by the court, plaintiffs have recognized that such a claim is appropriate.

IV.

THE GRANTING OF THIS MOTION WOULD NOT CAUSE UNDUE DELAY OR BE PREJUDICIAL TO ANY OF THE DEFENDANTS

To the extent that the defendants may claim that they are prejudiced by the amendment at the Pretrial Conference Order, such is without merit. The sole significance of the amendment is to add a legal theory related to *Monell* liability, but which is based upon the same set of facts are presented in plaintiffs' complaint. Moreover, the court instructed the defendants to brief the issue on two occasions; consequently, the defendants were well aware of

the possibility that the court was considering the issue. In addition to the foregoing, no prejudice would result since, necessarily, *all* the information and facts concerning the procedures, if any, to retrieve property seized during the course of a search warrant are within the defendants' own knowledge.

Furthermore, the parties have conducted thorough discovery in this action and have presented the relevant portions of that discovery in their cross-motions for summary judgment. The defendants' method of discovery in this matter would not have changed had the complaint stated a cause of action for a violation of Procedure Due Process. In other words, relief requested herein would not prejudice the defendants in that all of the facts are either already discovered or within their own knowledge. Since no additional discovery need be taken, no undue delay will result.

Finally, plaintiffs have made this motion in order to obtain a full hearing on the merits of their claim and not with a dilatory or bad motive.

V.

CONCLUSION

For the reasons set forth herein and under the law hereinabove cited, it is respectfully submitted that it is in the best interest of justice to permit plaintiffs to include, in the Pretrial Conference Order, the issue statements

regarding the Procedural Due Process claim under 42 U.S.C. §1983

DATED: June 8, 1994 Respectfully submitted,

KLASS, HELMAN & ROSS

By /s/ Patrick S. Smith
PATRICK S. SMITH
Attorneys for Plaintiffs

DECLARATION OF PATRICK S. SMITH

I, PATRICK S. SMITH, declare as follows:

1. I am an attorney at law duly licensed to practice in all the courts of the State of California and the United States District Courts for the Central District of California. I am an associate in the firm Klass, Helman & Ross, attorney of record for Plaintiffs, herein. I know the following facts to be true of my own personal knowledge and if called upon to testify, I could competently testify thereto.

2. Attached hereto as Exhibit "A" is a true and correct copy of the [Proposed] Pretrial Conference Order lodged with the court by the parties in this action.

3. Attached hereto as Exhibit "B" is a true and correct copy of the court's ORDER regarding the parties' cross-motions for summary judgment.

4. The Proposed Pretrial Conference Order in this matter includes the Procedural Due Process statement as both an issue of fact and an issue of law. Plaintiffs' respectfully request that the court grant the relief

requested by including the Procedural Due Process claim in the Pretrial Conference Order.

5. Any claim by the defendants in this action that prejudice will result is unfounded. All of the facts regarding the attempts by Mr. Perkins to retrieve his currency, were discovered by the defendants, and nothing else could have been done. The sole significance of the amendment is to add a legal theory related to *Monell* liability, but which is based on the same set of facts are presented in plaintiffs' complaint. The court previously instructed the defendants to brief the issue on two occasions. Thus, the defendants were well aware that the court was considering the issue. In addition, no prejudice would result since, necessarily, *all* the information and facts concerning the procedures, if any, to retrieve property seized during the course of a search warrant are within the defendants' own knowledge. The parties have conducted discovery in this action and have presented the relevant portions of that discovery in their cross-motions for summary judgment. The defendants' method of discovery in this matter would not have changed, in my opinion, had the complaint stated a cause of action for a violation of Procedure Due Process. In other words, the proposed amendment or statement of issue in the Pretrial Conference Order does not prejudice the defendants in that all of the facts are either already discovered or within their own knowledge.

6. The only addition to the Proposed Pretrial Conference Order would be the inclusion of this legal theory as to the interpretation of facts already discovered by both parties. No undue delay of time would occur as a result of the inclusion of the statement of issue in the

Pretrial Conference Order, and the plaintiffs have not made this motion with a bad faith or dilatory motive.

7. Your declarant respectfully prays for the relief herein requested and that the court include in the Pretrial Conference Order the proposed Procedure Due Process issue.

I declare under penalty of perjury of the laws of the California that the foregoing is true and correct.

Executed this 8th day of June, 1994, at Los Angeles, California.

/s/ Patrick S. Smith
PATRICK S. SMITH

[Proof Of Service Omitted In Printing]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Lawrence Perkins, et al. Plaintiffs, v. The City of West Covina, et al. Defendants.	)	CV 93-7084 SVW (CTX) ORDER (Filed Jul. 6, 1994)

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Introduction

Presently before the Court is a civil rights action alleging violations of plaintiffs' Fourth Amendment rights. The claims stem from the allegedly unlawful search of plaintiffs' home as well as the allegedly unlawful seizure of plaintiffs' property, including approximately $2,500 in cash and a starter pistol. Plaintiffs have named as defendants the City of West Covina and the officers present during the search of their home.

By means of an Order dated May 10, the Court granted summary judgment in favor of all defendants on the claim that the defendants failed to meet the proper knock-notice requirements and the claim that the search warrant was issued without probable cause. The Court also granted summary judgment in favor of the City of West Covina on the Claim for unlawful search.

The Court presently grants summary judgment for all defendants on the claim for unlawful seizure of plaintiffs' property.

Statement of Facts

Lawrence Perkins, Clara Perkins and April Perkins ("plaintiffs") reside at 531 Balham Street in West Covina. On May 21, 1993, their home was searched by police officers of the City of West Covina (the "City"). Among the officers present at the search were defendants Detective Ferrari, Detective Melnyk, Lieutenant Schimanski, Detective Aldecoa and Detective O'Brien (the "individual defendants").

On May 18, 1993, an individual named Julio Alberto Clark had been shot to death at the residence of Lashaun McDuffy. The police searched McDuffy's residence. They found evidence linking McDuffy's boyfriend Marcus Marsh (a.k.a. Marcus Winter) to the murder. They also found a vial of cocaine and $994.00 in cash.

Marsh was known by the police department to be a member of the neighborhood Crips street gang. Furthermore, he had prior arrests for carrying a concealed weapon, attempted murder, possession of stolen property, sale of cocaine and grand theft.

McDuffy provided the police with Marsh's telephone number. This number was traced to plaintiffs' address, where Marsh had been boarding. On May 20, 1993, the Honorable Dan Thomas Oki signed a search warrant ordering the search of plaintiffs' house. The warrant authorized a search for "any evidence of street gang activity" as well as "[a]ny evidence of firearms of the following caliber: 9mm."

During the search, the police confiscated suspected gang clothing, paperwork belonging to Marsh and an

address book belonging to Mr. Perkins. The police also seized numerous pictures depicting gang members, several guns and various types of ammunition.

Discussion

City of West Covina

As a general rule, a municipality is not liable under 42 U.S.C. § 1983 on the basis of respondeat superior. Instead, the municipality will only be held liable if plaintiff shows that the violation resulted from an unconstitutional policy, practice or custom. *See Monell v. Department of Social Servs.*, 98 S.Ct. 2018 (1978); *accord St. Louis v. Praprotnik*, 108 S.Ct. 915, 926 (1988). In order to prevail, plaintiff need not produce evidence of a written policy. Instead, plaintiff may produce evidence of a long and frequent pattern of constitutional deprivations. In the alternative, plaintiff may prove that the unconstitutional action was taken by an individual with policy making authority. *Monell*, 98 S. Ct. at 2036. Furthermore, a custom or practice may be inferred where governmental officials act in deliberate indifference in refusing to sanction an employee for engaging in unconstitutional conduct. *McRorie v. Shimoda*, 795 F.2d 780 (9th Cir. 1986) (where plaintiff alleged that he was deprived of his liberty rights by prison guards, the appellate court overruled the dismissal of prison wardens as defendants, finding that plaintiff should have the opportunity to amend his complaint to state that wardens were aware of and were deliberately indifferent to the violations); *accord Thompson v. City of Los Angeles*, 885 F.2d 1439 (9th Cir. 1989).

In the present case, plaintiffs have offered no evidence that unlawful seizures are condoned by the City of West Covina. Nor have plaintiffs produced evidence of a pattern of unlawful seizures. Finally, plaintiffs have failed to offer evidence that City policy-making officials were aware of, but were deliberately indifferent to, the seizure of plaintiffs' cash and starter pistol. Accordingly, the Court must GRANT the City's motion for summary adjudication on plaintiffs' claim for seizure of the cash and the starter pistol.

Individual Defendants

The Court finds that the individual defendants are, as a matter of law, entitled to qualified immunity on plaintiffs' claim for seizure of the $2,469.00 and the starter pistol. Accepting the facts in the light most favorable to plaintiff, the Court finds that a reasonable police officer could have believed that, under clearly established principles of law, he was entitled to seize plaintiffs' property. *Act Up/Portland v. Bagley*, 988 F.2d 868 (9th Cir. 1993).

A police officer may seize property under the plain view doctrine if the officer is in a lawful position to view the item, the discovery of the item is inadvertent, and the item reasonably appears to be evidence of a crime. *United States v. Washington*, 797 F.2d 1461 (9th Cir. 1986).

In the present case, there is no question that the officers were in a lawful position when they viewed plaintiffs' cash and pistol. The officers had a valid warrant to search the entire house for guns and gang paraphernalia. Both the cash and the starte[r] pistol were seized in places where the guns and gang paraphernalia

could have been found. Furthermore, the discovery of the cash and starter pistol was, accordingly to the undisputed evidence, inadvertent. Accordingly, the only issue is whether a reasonable police officer could have believed that there was probable cause to seize the cash and starter pistol.

A reasonable officer could undoubtedly have believed that the starter pistol was evidence of a crime. Defendants have submitted affidavits stating that starter pistols are often used by gang members to frighten, harass and inflict bodily harm. Furthermore, the police had reason to believe that gang members resided in plaintiffs' house – not only were they informed that Marcus Marsh resided there, but they also found pictures depicting individuals in traditional gang attire making gang "signs" with their hands. In short, a reasonable officer, based upon the suspicion that gang members resided in plaintiffs' house and their knowledge regarding the potential use of the starter pistol, could have believed that the pistols were evidence of illegal gang activity.

A reasonable officer could also have believed that the cash was evidence of a crime, specifically drug dealing. A number of Circuit Courts have upheld the seizure of cash as evidence of drug crimes. *See e.g., U.S. v. Garcia*, 983 F.2d 1160 (1st Cir. 1993); *U.S. v. Vargas*, 945 F.2d 426 (1st Cir. 1991); *U.S. v. Cooper*, 942 F.2d 1200 (7th Cir. 1991); *U.S. v. Gordils*, 982 F.2d 64 (2nd Cir. 1992).

It is true that the cited cases involved greater sums of money than the sum involved in the present case, and that, in all of the cited cases, the officers performing the

search discovered additional incriminating evidence such as drugs along with the cash. However, considering the facts known by the officers in the present case, it would be unreasonable to expect an officer acting in the line of duty to make the subtle distinction between the facts of *Garcia, Vargas* and *Gordils* and the present case. First, not only did the officers reasonably believe that Marsh resided in plaintiffs' house, but they also had reason to believe that Marsh was involved in illegal drug activity. Marsh had at least one prior arrest for drug dealing. Furthermore, Marsh was the chief suspect in a murder which took place at the residence of Lashaun McDuffy. In searching McDuffy's residence, the police found cocaine as well as approximately $1,000 in cash. In view of these facts, an officer could have concluded that the cash was the proceeds of Marsh's drug dealing. Second, in searching plaintiffs' house the police uncovered a number of suspicious items such as guns, ammunition, gang photos and false identification cards. These items would corroborate the officer's belief that the cash was evidence of a crime. Third, plaintiffs' home is an inexpensive home in a working class neighborhood, $2,500 is a suspiciously large sum of money to find stashed away in such a house.

Plaintiffs argue that a reasonable police officer could not have believed that there was probable cause to seize the cash because was seized from the Southwest bedroom and, based on the paperwork seized from that bedroom, a reasonable officer would have known that the bedroom was used exclusively by the plaintiffs and not by Marsh. Thus, because there was no reason to connect the Southwest bedroom with Marsh, a reasonable officer could not have believed that the cash was evidence of a drug crime.

The Court must reject this argument for several reasons. First, the house, as depicted in photographs offered by both plaintiffs and defendants, is a small house. It does not consist of discernible "apartments." A reasonable officer would not necessarily conclude that an individual residing in the house did not have access to one particular bedroom. Secondly, the paperwork seized in the Southwest bedroom is inconclusive in identifying the resident of the bedroom. Although the address book was inscribed with the name of Lawrence Perkins, a social security card with the name of an entirely different individual was discovered. Because of this disparity, a reasonable officer may not, based upon the paperwork alone, have known that the plaintiffs had exclusive access to the room. Finally, several suspicious items, such as guns and ammunition, were seized in the Southwest bedroom along with the cash.

In short the Court must find, as a matter of law, that a reasonable police officer could have believed that there was probable cause to seize the cash and the starter pistol. Accordingly, the individual defendants are entitled to summary judgment on the grounds of qualified immunity.

Conclusion

The Court grants defendants' motion for summary judgment on plaintiffs' claim for unlawful seizure of the cash and the starter pistol.

IT IS SO ORDERED

DATED: July 1, 1994

/s/ Stephen V. Wilson
STEPHEN V. WILSON
UNITED STATES DISTRICT
JUDGE

PATRICK S. SMITH, Bar # 120220
EDWARD M. FOX, Bar #123075
KLASS, HELMAN & ROSS
11766 Wilshire Blvd., Suite 350
Los Angeles, California 90025
(310) 277-2224

Attorneys for Plaintiffs,
LAWRENCE PERKINS, CLARA PERKINS
AND APRIL PERKINS

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LAWRENCE PERKINS, CLARA PERKINS, APRIL PERKINS, minor, by and through her Guardian ad Litem, Lawrence Perkins, Plaintiffs, v. THE CITY OF WEST COVINA, a political subdivision of the State of California; DETECTIVE FERRARI; DETECTIVE MELNYK; LIEUTENANT SCHIMANSKI; THE COUNTY OF LOS ANGELES, a political subdivision of the State of California, and DOES 1 through 50, inclusive, Defendants.	) Case No. CV93-7084 SVW (CTx)) SECOND NOTICE OF APPEAL (Filed Aug. 31, 1994)

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that plaintiffs, Lawrence Perkins and Clara Perkins, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the orders granting summary judgment and trial rulings. The previous notice may have been prematurely filed and therefore, plaintiffs are filing this Second Notice of Appeal. Further, counsel for the defendants has changed. Counsel for Defendants is:

Shel Harrell, Esq., Franscell, Strickland, Roberts & Lawrence, 401 Civil Center Drive West, Suite 800, Santa Ana, California 92701-7502.

Dated: August 29, 1994

KLASS, HELMAN & ROSS

By /s/ Patrick S. Smith
PATRICK S. SMITH
Attorney for Plaintiffs

[Proof Of Service Omitted In Printing]

DAVID D. LAWRENCE, State Bar No. 123039
FRANSCELL, STRICKLAND, ROBERTS & LAWRENCE
A Professional Corporation
225 South Lake Avenue, Penthouse
Pasadena, CA 91101-3005
(818) 304-7830

Attorneys for Defendant
CITY OF WEST COVINA

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LAWRENCE PERKINS; CLARA PERKINS, APRIL PERKINS, a minor, by and through her Guardian ad Litem, Lawrence Perkins, Plaintiffs, v. CITY OF WEST COVINA, et al., Defendants,	No. CV 93-7084 SVW (9th Cir. No. 94-56365) **NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATIONS OF DAVID D. LAWRENCE AND MICHAEL FERRARI** (Received June 12, 1996) **[SEPARATE STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW FILED CONCURRENTLY HEREWITH]** **Date: June 24, 1996** **Time: 1:30 p.m.** **Crtm: "6"**

DECLARATION OF DAVID D. LAWRENCE

I, DAVID D. LAWRENCE, state and declare as follows:

1. I am an attorney at law, duly authorized to practice before this Court and I am a shareholder in the firm of Franscell, Strickland, Roberts & Lawrence, attorneys for defendant City of West Covina in the instant action. If called upon to do so, I could and would competently testify to the facts set forth herein of my own personal knowledge.

2. Attached hereto as Exhibit "1" are true and correct copies of the following pages of the deposition of plaintiff Lawrence Perkins taken on February 25, 1994: 205, 206, 207 and 208.

3. Attached hereto as Exhibit "2" is a true and correct copy of the SEARCH WARRANT NOTICE OF SERVICE which was left at the plaintiff's residence following the search. This document was provided to defense counsel by plaintiff's counsel at the early meeting of counsel which was conducted on January 26, 1994 and was submitted by plaintiffs Lawrence and Clara Perkins in support of their motion for summary judgment as Exhibit "A".

4. Attached hereto as Exhibit "3" is a true and correct copy of the declaration of Jeffrie Madland submitted to the Court by plaintiffs on or about May 23, 1994 in conjunction with their SUPPLEMENTAL BRIEFING RE ISSUES RAISED IN COURT'S ORDER OF MAY 10, 1994; DECLARATION OF JEFFRIE MADLAND.

5. Attached hereto as Exhibit "4" is a true and correct copy of a letter I sent on February 10, 1994 to plaintiff's counsel advising plaintiff's counsel that a court order was needed in order for the seized property to be returned to plaintiffs and advising plaintiff's counsel of the *Penal Code* § 1536 procedure.

6. During the course of litigation in this case, it became apparent to me that plaintiffs were going to rely upon their own lack of effort in contending that the West Covina Police Department was wrongfully maintaining custody of their seized property. Consequently, I directed an associate of my firm to prepare and file with the appropriate court a request and proposed order releasing the seized property to the plaintiffs or their counsel. Attached hereto as Exhibit "5" is a true and correct copy of the request which was filed with the Los Angeles County Superior Court on or about May 17, 1994 and signed by Superior Court Judge Charles W. McCoy, Jr., on June 17, 1994.

7. Attached hereto as Exhibit "6" is a true and correct copy of a letter sent via facsimile and mail on June 21, 1994 to plaintiff's counsel by an associate with my firm who was handling the trial of this matter. The exhibit includes a copy of the June 17, 1994 order of Judge McCoy and points out to plaintiff's counsel that the application and order was signed. The letter refers to additional attachments including Detective Ferrari's notebook and a police report regarding the seized starter pistol which I have not included with the exhibit since they are not particularly pertinent to the instant motion.

8. I am informed and believe that plaintiff's counsel was in possession of the search warrant number as early as January 26, 1994 when defendants provided documents to plaintiff's counsel at the early meeting of counsel. Furthermore, the records on file in this case show that plaintiff's counsel had the search warrant number when defendants served their motion for summary judgment on March 15, 1994. Specifically, Exhibit "1" to that motion included the face page of the search warrant which included the search warrant number, i.e., J4286. A true and correct copy of the first page of Exhibit "1" submitted in conjunction with defendant's motion for summary judgment is attached hereto as Exhibit "7". To my knowledge, even after having the search warrant number, plaintiff's counsel did nothing to obtain an order returning the property to plaintiff.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 12th day of June, 1996, at Pasadena, California.

/s/ David D. Lawrence
DAVID D. LAWRENCE

DECLARATION OF MICHAEL FERRARI

I, MICHAEL FERRARI, state and declare as follows:

1. I am currently employed as a Detective with the West Covina Police Department and was involved in obtaining the search warrant which resulted in the search of the home of Lawrence Perkins on May 21, 1993.

2. Sometime after June 17, 1994 and before June 24, 1994, I was provided with a Court order signed by Superior Court Judge Charles W. McCoy, Jr., a true and correct copy of which is attached hereto as Exhibit "5". That order authorized the release of six categories of items including cash in the amount of $2,469.00 and a 12 gauge shotgun. On June 24, 1994, all of the items referenced in the June 17, 1994 order were released to Lawrence Perkins, including the cash and a shotgun with the exception of the starter pistol. The starter pistol was not released since I determined from West Covina Crime Report No. 86-6463 that the pistol was reported stolen from the West Covina High School.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 12th day of June, 1996 at West Covina, California.

/s/ Michael Ferrari
MICHAEL FERRARI

DEFENDANTS' EXHIBIT 1

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LAWRENCE PERKINS, CLARA PERKINS, APRIL PERKINS, minor, by and through her Guardian ad Litem, LAWRENCE PERKINS,	)	
Plaintiffs,	)	No. CV 93-7084 SVW (CTx)
vs.	)	
THE CITY OF WEST COVINA, et al.,	)	
Defendants.	)	

DEPOSITION OF LAWRENCE PERKINS

February 25, 1994

* * *

[p. 205] Q. Was that, would you say, a large part of your emotional distress or a small part of it?

A. That was the – that was the main part of my emotional distress, fear for my family in a unsecured home.

Q. Did you say you haven't talked to anybody at the sheriff's department about the search?

A. L.A. County Sheriff's Department I hadn't.

Q. Have you ever spoken to any person associated with the Orange County Sheriff's Department or Police Department about the search of your home?

A. No.

Q. Did Detective Ferrari ever tell you that he does not object to the return of your money or property?

A. I don't remember him telling me that.

Q. Did anyone ever tell you that the police department is not entitled to return your property without a court order?

A. That they are – repeat the question.

Q. Has anyone ever told you that a court order is required for the release of your property from the West Covina Police Department?

A. I found out later, yes. I believe is [p. 206] the – that man Schimanski told me that.

Q. Do you recall when Lt. Schimanski told you that?

A. No, I don't.

Q. Have you made any effort to get a court order to get your property back?

A. Yes, I have.

Q. And what have you done in that regard?

A. I went to the courts to get a court order.

Q. And when did you do that?

A. I don't remember exact date.

Q. Can you estimate about how long after the search you did that?

A. Maybe about a month after the search.

Q. Was there an application that you were told to fill out?

A. No.

Q. What were you told when you went to the court?

A. It wasn't anything in the courts under my name.

Q. Which court did you go to?

A. West Covina.

Q. Municipal Court?

[p. 207] A. I went to – they told me to go to some little place up there, the – so I could see the judge and give him a – what is that, a book – no, a case number.

Q. Who told you this?

(Ms. Clara Perkins entered the deposition room.)

THE WITNESS: Oh, I don't – I don't remember who told me that, but Ferrari gave me a case number that wasn't a case number at all. And when he finally gave me what's supposed to have been the right case number, I carried it there, and they told me they had nothing in the courts under my name.

Q. BY MS. HOVIND: Do you know which judge, if it was a judge, told you that?

A. No, it wasn't a judge. I – judge – I suppose was the same judge that signed that, Judge Oki.

Q. And did you see Judge Oki?

A. No.

Q. I didn't hear you before that. Did you say you were told to see Judge Oki?

A. It's Ferrari told me I had to see Judge Oki, the one that signed that. But he was supposed to have been on vacation, so I was going to see – they said any judge could release it, so I went to this [p. 208] little room to see about seeing a judge, but they had nothing in the courts under my name.

Q. Has anyone ever told you that you need to fill out an application for a court order to get your property back?

A. No.

Q. Have you ever filled out any documents to try to get a court order to get your property back?

A. No.

Q. And no one has ever told you that's the method to use?

A. No.

Q. If you knew that that's what you had to do, would you do it?

A. I would have done it.

Q. Is there any other property damage that you attribute to the search of you home that day that you haven't yet testified to?

A. No, other than my sofas being cut up. That's about it.

Q. Do you have photographs of the damage to your sofa?

A. No, I did not take photographs of that because it was – it was – I didn't know about it at the time.

* * *

DEFENDANTS' EXHIBIT 2

*531 Balham; La Puente**

Return

813-3239

SEARCH WARRANT:
NOTICE OF SERVICE

Det. Ferrari
814-8526

TO WHOM IT MAY CONCERN:

1. THESE PREMISES HAVE BEEN SEARCHED BY PEACE OFFICERS OF THE (name of searching agency) *West Covina Police* DEPARTMENT PURSUANT TO A SEARCH WARRANT ISSUED ON (date) *5-20-93*, BY THE HONORABLE (name of magistrate) *Dan Oki*, JUDGE OF THE SUPERIOR/MUNICIPAL COURT, *Citrus* JUDICIAL DISTRICT.

---

*Italicized words, numbers, and other characters represent those portions which appear in handwritten form on the original document.

2. THE SEARCH WAS CONDUCTED ON (date) *5-21-93*. A LIST OF THE PROPERTY SEIZED PURSUANT TO THE SEACH WARRANT IS ATTACHED.

3. IF YOU WISH FURTHER INFORMATION, YOU MAY CONTACT:

(name of investigator) *Det. Ferrari or Det. Melnyk* AT (telephone number) *(818) 814-8510*

LT. SCHIMANSKI 814-8516

DEFENDANTS' EXHIBIT 3

DECLARATION OF JEFFRIE MADLAND

I, Jeffrie Madland, state and declare as follows:

1. I am the secretary to Edward M. Fox, attorney for plaintiffs herein. I know the facts herein to be true of my own personal knowledge. If called upon to testify, I could and would testify competently thereto.

2. On May 2, 1994, I contacted the Citrus Municipal court, Criminal Division, and spoke with Diane, court clerk. I indicated that I wanted to obtain the search warrant number and date of return for a warrant that was issued under seal. Diane stated that a "search warrant that is issued under seal is not open to the public." I indicated that I was calling on behalf of the party whose home was searched and she stated that if the search

warrant was under seal, "it would not even be open to the person whose home was searched."

I declare under penalty of perjury that the foregoing is true and correct. Executed this 23rd day of May, 1994, at Los Angeles, California.

/s/ Jeffrie Madland
JEFFRIE MADLAND

DEFENDANTS' EXHIBIT 4

FRANSCELL, STRICKLAND, ROBERTS & LAWRENCE
A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

[names omitted in printing]

February 10, 1994

Patrick S. Smith, Esq.
Klass, Helman & Ross
11766 Wilshire Boulevard
Suite 350
Los Angeles, CA 90025

Re: *Perkins v. City of West Covina, et al.* Our File No. 0033-011

Dear Mr. Smith:

At the Status Conference, you indicated that the plaintiffs had attempted to obtain the return of money and guns which were taken during the search of their residence. I have spoken with detective Melnyk and he advised that quite early on he informed the plaintiffs that all they needed to do was to request that the Court order

the property returned and it would be returned. I have been advised that there are a few items which will need to be retained for the pending prosecution, but that there will be no objection to the return of the cash or the shot gun. The appropriate procedure is under Penal Code § 1536.

Secondly, I have received the plaintiffs' responses to Request for Production and note that photocopies of photographs are attached. I have not yet had a chance to go through the responses completely, however, the xeroxed copies of photographs are very poor quality and I simply cannot tell what is depicted in those photographs. I would appreciate you providing me with either duplicates of these photographs or allow me to have custody of them for a short period of time so that I can have color xerox copies made. There is a place across the street from my office that can color xerox the photographs. Please let me know within the next week how you prefer to proceed on this.

Finally, as you know, Judge Wilson ordered that defendants file Motions for Summary Judgment by March 15, 1994. In going through the reports which you now have, I note that there are three officers who conducted the search of the plaintiffs' residence, i.e., Officers Nalian, O'Brien and Aldecoa who are not defendants. If you intend to make these officers defendants in this case, please do so as soon as possible so that we do not have to go through multiple rounds of summary judgment motions. In a similar case, i.e., *Harper v. Riverside*, your office waited until after I had filed summary judgment motions to add additional defendants. I am not suggesting that these officers *should* be made defendants, but if

you intend to make them defendants, please do so so that they can be included in the summary judgment motions I will be filing on or before March 15th. If you proceed in a manner like that in *Harper v. Riverside*, I will have to give consideration to seeking expenses under 28 U.S.C. § 1927.

Thank you for your anticipated cooperation.

Very truly yours,

FRANSCELL, STRICKLAND,
ROBERTS & LAWRENCE

/s/ David D. Lawrence
David D. Lawrence

DEFENDANTS' EXHIBIT 5

DAVID D. LAWRENCE, State Bar No. 123039
FRANSCHELL, STRICKLAND, ROBERTS & LAWRENCE
A Professional Corporation
225 South Lake Avenue, Penthouse
Pasadena, CA 91101-3005
Telephone No. (818) 304-7830

ATTORNEYS FOR CITY OF WEST COVINA, DETECTIVE FERRARI, DETECTIVE MELNYK, DETECTIVE DAN NALIAN, DETECTIVE DARIO ALDECOA, DETECTIVE JAMES O'BRIEN, LIEUTENANT WAYNE HEIECK and LIEUTENANT SCHIMANSKI

LOS ANGELES COUNTY SUPERIOR COURT
POMONA JUDICIAL DISTRICT

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. MARCUS MARSH, Defendants.	Case No. KA 018341 **REQUEST AND [PROPOSED] ORDER FOR RELEASE OF PROPERTY** (Filed Jun. 17, 1994)

Undersigned counsel represents the City of West Covina, Detective Ferrari, Detective Melnyk, Detective Dan Nalian, Detective Dario Aldecoa, Detective James O'Brien, Lieutenant Wayne Heieck and Lieutenant Schimanski in a civil suit which is pending in the United States District Court, Central District of California entitled *Lawrence Perkins, et al. v. City of West Covina, et al.*, Case No. CV 93-7084 SBW (CTx). This application is made on behalf of Detective Michael Ferrari who was the detective who obtained the search warrant in question. The aforementioned civil suit arises out of the search which was conducted pursuant to Search Warrant No. J4286.

REQUEST FOR RELEASE OF PROPERTY

Items were seized pursuant to Search Warrant No. J4286 from the premises described as the residence located at 531 Balham Avenue, City of La Puente, County of Los Angeles, further described as a single family residential dwelling with a detached garage, tan stucco walls, brown wood trim, and a rock roof. The front door faces

east and the numbers 531 are next to the front door. The items seized are being retained in police custody pursuant to *Penal Code* § 1536.

Petitioner seeks the release of certain of these items from police custody for purposes of disposition of them. The items for which release is sought are:

1. $2,469.00 in United States currency;

2. A starter pistol;

3. A 12-gauge shotgun as described as Item No. 6 on the West Covina Police Department Property Inventory Sheet, attached hereto as Exhibit "A";

4. One black case, although police will continue to retain the ammunition located within in, as described as Item No. 15 on the West Covina Police Department Property Inventory Sheet, attached hereto as Exhibit "A";

5. One soft gun case with black plastic grip as described as Item No. 17 on the West Covina Police Department Property Inventory Sheet, attached hereto as Exhibit "A";

6. Miscellaneous papers and phone books in the names of C. Perkins and L. Perkins as described as Item No. 13 on the West Covina Police Department Property Inventory Sheet, attached hereto as Exhibit "A".

These items were seized in connection with the above entitled case but are no longer needed for the following reason:

The criminal prosecution against Marcus Marsh, a.k.a. Marcus Winter for homicide was concluded on

April 21, 1994, wherein he was sentenced to twelve years in prison.

The proposed disposition of these items upon release to petitioner is as follows:

Please permit the owners of such property, Clara Mae Perkins or Lawrence Perkins, or their attorneys, Klass, Helman & Ross to retrieve such items.

WHEREFORE, petitioner seeks the release of said items.

I swear under penalty of perjury the foregoing is true and correct to the best of my information and belief.

DATED: May 13, 1994

FRANSCHELL, STRICKLAND, ROBERTS & LAWRENCE

By /s/ David D. Lawrence
David D. Lawrence

Attorneys for CITY OF WEST COVINA, DETECTIVE MICHAEL FERRARI, DETECTIVE DAVID MELNYK, DETECTIVE DAN NALIAN, DETECTIVE DARIO ALDECOA, DETECTIVE JAMES O'BRIEN, LIEUTENANT WAYNE HEIECK and LIEUTENANT SCHIMANSKI in Case No. CV 93 7084 SVW (CTx)

Attachment Page No. ____

WEST COVINA POLICE DEPARTMENT
PROPERTY INVENTORY SHEET

1 PAPER WORK IN NAME OF MICHAEL MARSH W/M BEDROOM
2 CANG CLOTHES KITCHEN TABLE
3 CANG CLOTHES S/W BEDROOM
4 .38 CAL RD .25 CAL RD, 55 GRD S/W BEDROOM
5 STARTER PISTOL S/W BEDROOM CLOSET
6 SHOT GUN MOSSBERG SIK 897125 12 GA S/W BEDROOM
7 ONE SAFE / MACHINE PISTOL CLIP W/LIVE RDS, WINCHESTER
8 BOX OF .45 CAL AUTO BULLETS, BOX OF FEDERAL .380
9 RD, BOX OF FEDERAL .45 AUTO RDS, 2 .45 AUTO
10 CLIPS, ONE LIVE .38 RD PAPER IN NAME OF
11 TONISHA Y. LEE 4125 S. SEATONS #107
12 ONE BEN CASE W/ 2,469 U.S. CURRENCY S/W BED ROOM
13 MISC. PAPERS & PHONE BOOKS IN NAME OF CHECKING ACCT.
14 THREE .12 GA SHOT GUN RDS
15 ONE BLACK CASE W/ 2 BOXES .357 RDS FIOCCHI
16 1 BOX 'FEDERAL' .357 RDS, 1 BOX WINCHESTER .22 RDS.
17 ONE SOFT GUN CASE W/ BLK PLASTIC GRIPS
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

BEST AVAILABLE COPY

ORDER FOR RELEASE OF PROPERTY

TO THE WEST COVINA POLICE DEPARTMENT

Good cause having been shown, it is ordered that the items described above be released from police custody into the custody of Clara Mae Perkins or Lawrence Perkins, or their attorneys, Klass, Helman & Ross.

DATED: 6/17/94

[SEAL]

/s/ Charles W. McCoy, Jr.
CHARLES W. MC COY, JR.
JUDGE OF THE SUPERIOR COURT

DEFENDANTS' EXHIBIT 6

FRANSCHELL, STRICKLAND, ROBERTS & LAWRENCE
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

[Names Omitted In Printing]

June 21, 1994

VIA FAX AND REGULAR MAIL

Patrick S. Smith, Esq.
Klass, Helman & Ross
11766 Wilshire Boulevard, Suite 350
Los Angeles, California 90025

Re: Perkins, et al. v. City of West Covina, et al.
Case No. ___ : ___ CV 93 7084 SVW (CTx)

Dear Mr. Smith:

As you are aware, I was not involved with this case prior to May 20, 1994. It was at approximately this time that I received the case for trial.

In any event, I chose five photographs of approximately 40 to present to the jury. I specifically mentioned these photographs on an Exhibit List which was served and filed on May 23, 1994. You waited until the issue presented itself before the Court on June 6, 1994, before you informally requested that I forward these photographs to you.

Based upon your request, I forwarded these photographs, via messenger, on June 7, 1994, to your office. Additionally, I requested that you provide me certain exhibits that were mentioned on your Exhibit List, which I did not

have. As of this date, I have not received anything by way of exhibits from you.

Although I would be happy to forward the remaining photographs, given what transpired in Court yesterday, I cannot. In other words, the issues which arose concerning chain of custody would preclude me from simply tearing open the evidence enveloped and informally distributing the photographs. Please know that the evidence envelopes will be brought to court tomorrow and will be available for your inspection.

I have attached the relevant page from Detective Ferrari's notebook together with a police report regarding the starter pistol which was seized in this case. Although it is standard impeachment-type evidence, I am providing it based upon your informal request.

Finally, I thought you might be interested in the signed order which I received today. As you can see, it took 30 days for the Court to approve the release of your client's money.

Should you wish to discuss the photographs, please do not hesitate to call.

Very truly yours,

FRANSCELL, STRICKLAND,
ROBERTS & LAWRENCE

/s/ Jeff Giordana
JEFF GIORDANO

JG:dj
Enclosure

5-25-94 0945
One Photo From Kitchen Table

Four Gang Photos From Bedroom

Release to Jeff Giordano

DAVID D. LAWRENCE, State Bar No. 123039
FRANSCELL, STRICKLAND, ROBERTS & LAWRENCE
A Professional Corporation
225 South Lake Avenue, Penthouse
Pasadena, CA 91101-3005
Telephone No. (818) 304-7830

ATTORNEYS FOR CITY OF WEST COVINA, DETECTIVE FERRARI, DETECTIVE MELNYK, DETECTIVE DAN NALIAN, DETECTIVE DARIO ALDECOA, DETECTIVE JAMES O'BRIEN, LIEUTENANT WAYNE HEIECK and LIEUTENANT SCHIMANSKI

LOS ANGELES COUNTY SUPERIOR COURT

POMONA JUDICIAL DISTRICT

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. MARCUS MARSH, Defendants.	Case No. KA 018341 **REQUEST AND [PROPOSED] ORDER FOR RELEASE OF PROPERTY** (Filed Jun. 17, 1994)

Undersigned counsel represents the City of West Covina, Detective Ferrari, Detective Melnyk, Detective Dan Nalian, Detective Dario Aldecoa, Detective James O'Brien, Lieutenant Wayne Heieck and Lieutenant Schimanski in a civil suit which is pending in the United States District Court, Central District of California entitled *Lawrence Perkins, et al. v. City of West Covina, et al.*, Case No. CV 93-7084 SBW (CTx). This application is made on behalf of Detective Michael Ferrari who was the detective who obtained the search warrant in question. The aforementioned civil suit arises out of the search which was conducted pursuant to Search Warrant No. J4286.

REQUEST FOR RELEASE OF PROPERTY

Items were seized pursuant to Search Warrant No. J4286 from the premises described as the residence located at 531 Balham Avenue, City of La Puente, County of Los Angeles, further described as a single family residential dwelling with a detached garage, tan stucco walls, brown wood trim, and a rock roof. The front door faces east and the numbers 531 are next to the front door. The items seized are being retained in police custody pursuant to *Penal Code* § 1536.

Petitioner seeks the release of certain of these items from police custody for purposes of disposition of them. The items for which release is sought are:

1. $2,469.00 in United States currency;

2. A starter pistol;

3. A 12-gauge shotgun as described as Item No. 6 on the West Covina Police Department Property Inventory Sheet, attached hereto as Exhibit "A";

4. One black case, although police will continue to retain the ammunition located within as described as Item No. 15 on the West Covina Police Department Property Inventory Sheet, attached hereto as Exhibit "A";

5. One soft gun case with black plastic grip as described as Item No. 17 on the West Covina Police Department Property Inventory Sheet, attached hereto as Exhibit "A";

6. Miscellaneous papers and phone books in the names of C. Perkins and L. Perkins as described as Item No. 13 on the West Covina Police Department Property Inventory Sheet, attached hereto as Exhibit "A".

These items were seized in connection with the above entitled case but are no longer needed for the following reason:

The criminal prosecution against Marcus Marsh, a.k.a. Marcus Winter for homicide was concluded on April 21, 1994, wherein he was sentenced to twelve years in prison.

The proposed disposition of these items upon release to petitioner is as follows:

Please permit the owners of such property, Clara Mae Perkins or Lawrence Perkins, or their attorneys, Klass, Helman & Ross to retrieve such items.

WHEREFORE, petitioner seeks the release of said items.

I swear under penalty of perjury the foregoing is true and correct to the best of my information and belief.

DATED: May 13, 1994

FRANCELL, STRICKLAND,
ROBERTS & LAWRENCE
By /s/ David D. Lawrence
David D. Lawrence

Attorneys for CITY OF WEST COVINA, DETECTIVE MICHAEL FERRARI, DETECTIVE DAVID MELNYK, DETECTIVE DAN NALIAN, DETECTIVE DARIO ALDECOA, DETECTIVE JAMES O'BRIEN, LIEUTENANT WAYNE HEIECK and LIEUTENANT SCHIMANSKI in Case No. CV 93 7084 SVW (CTx)

ORDER FOR RELEASE OF PROPERTY

TO THE WEST COVINA POLICE DEPARTMENT

Good cause having been shown, it is ordered that the items described above be released from police custody

into the custody of Clara Mae Perkins or Lawrence Perkins, or their attorneys, Klass, Helman & Ross.

DATED: 6/17/94

[SEAL]

/s/ Charles W. McCoy, Jr.
CHARLES W. MC COY, JR.
JUDGE OF THE SUPERIOR COURT

DEFENDANTS' EXHIBIT 7

J4286

Search Warrant No.

STATE OF CALIFORNIA – COUNTY OF LOS ANGELES
SEARCH WARRANT AND AFFIDAVIT

THE PEOPLE OF THE STATE OF CALIFORNIA TO ANY SHERIFF, POLICEMAN OR PEACE OFFICER IN THE COUNTY OF LOS ANGELES:

proof by affidavit having been made before me by

___ Michael Ferrari _____ that there is probable cause
(name of affiant)
to believe that the property described herein may be found at the locations set forth herein and that it is lawfully seizable pursuant to Penal Code Section 1524 as indicated below by "X"(s) in that it:

_____ was stolen or embezzled

XXX was used as the means of committing a felony

XXX is possessed by a person with the intent to use it as a means of committing a public offense or is possessed by another to whom he may have delivered it for the purpose of concealing it or preventing its discovery

XXX is evidence which tends to show that a felony has been committed or a particular person has committed a felony

_____ is evidence which tends to show that sexual exploitation of a child, in violation of Section 3133.3, has occurred or is occurring:

YOU ARE THEREFORE COMMANDED TO SEARCH:

1) The residence located at 531 Balham Avenue, city of La Puente, county of Los Angeles, further described as a single family residential dwelling with a detached garage, tan stucco walls, brown wood trim, and a rock, roof. The front door faces east, and the numbers 531 are next to the front door.

2) The residence located at 1410 West Delhaven Avenue, city of West Covina, county of Los Angeles, further described as a single family residential dwelling, with brown stucco walls, dark brown wood trim, a brown composition roof, and a[n] attached garage. The numbers 1410 appear on the wall next to the front door, and on the curb directly in front of the residence.

3) 736 Mustang circle, city of Walnut, county of Los Angeles, further described as a two story single family dwelling with an attached garage, white stucco walls, with brown wood trim. The numbers 736 are painted on the curb directly in front of the residence on the curb.

4) 13921 Francisquito room number 131, city of Baldwin Park, county of Los Angeles, also known as the "Travelodge Motel", a three story multi-unit building, with tan stucco walls and a red tile roof. Room number 131 is located on the east side of the building on the ground level. The numbers 131 are on the door.

The search shall induce any and all rooms, attics, basements, garages and other parts ther[e]in. The search shall also include any and all storage units, trash receptacles and out buildings on the property of the [ ] residence.

* * *

[PROOF OF SERVICE Omitted In Printing]

PATRICK S. SMITH, Bar # 120220
KLASS, HELMAN & ROSS
11766 Wilshire Blvd., Suite 350
Los Angeles, California 90025
(310) 277-2224

Attorneys for Plaintiffs,
LAWRENCE PERKINS, CLARA PERKINS
AND APRIL PERKINS

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LAWRENCE PERKINS, CLARA PERKINS, APRIL PERKINS, minor, by and through her Guardian ad Litem, Lawrence Perkins, Plaintiffs, v. THE CITY OF WEST COVINA, a political subdivision of the State of California; DETECTIVE FERRARI; DETECTIVE MELNYK; LIEUTENANT SCHIMANSKI; THE COUNTY OF LOS ANGELES, a political subdivision of the State of California, and DOES 1 through 50, inclusive, Defendants.	) Case No. CV93-7084 SVW (CTx)) OPPOSITION TO MOTION FOR SUMMARY JUDGMENT BY CITY OF WEST COVINA; MOTION FOR SUMMARY JUDGMENT; DECLARATION OF PATRICK S. SMITH) [Statement of Genuine Issues and Separate Statement of Uncontroverted Facts and Conclusions of Law filed concurrently herewith]) (Filed June 17, 1996)) Date: June 24, 1996) Time: 1:30 p.m.) Ctrm: 6

Plaintiffs hereby file the[ir] Opposition to Defendant City of West Covina's Motion for Summary Judgment.

Dated: June 17, 199[6]

KLASS, HELMAN & ROSS

By /s/ Patrick S. Smith
PATRICK S. SMITH
Attorneys for Plaintiffs

* * *

PLAINTIFFS' EXHIBIT A

Search Warrant No.

STATE OF CALIFORNIA – COUNTY OF LOS ANGELES
SEARCH WARRANT AND AFFIDAVIT

THE PEOPLE OF THE STATE OF CALIFORNIA TO ANY SHERIFF, POLICEMAN OR PEACE OFFICER IN THE COUNTY OF LOS ANGELES:

proof, by affidavit, having been made before me by ___ Michael Ferrari _____ that there is probable cause to
(name of affiant)
believe that the property described herein may be found at the locations set forth herein and that it is lawfully seizable pursuant to Penal Code Section 1524 as indicated below by "X"(s) in that it:

_____was stolen or embezzled
__XXX__was used as the means of committing a felony

__XXX__ is possessed by a person with the intent to use it as a means of committing a public offense or is possessed by another to whom he may have delivered it for the purpose of concealing it or preventing its discovery
__XXX__ is evidence which tends to show that a felony has been committed or a particular person has committed a felony
_____ is evidence which tends to show that sexual exploitation of a child, in violation of Section 3133.3, has occurred or is occurring:

YOU ARE THEREFORE COMMANDED TO SEARCH:

1) The residence located at 531 Balham Avenue, city of La Puente, county of Los Angeles, further described as a single family residential dwelling with a detached garage, tan stucco walls, brown wood trim, and a rock roof. The front door faces east, and the numbers 531 are next to the front door.

2) The residence located at 1410 West Delhaven Avenue, city of West Covina, county of Los Angeles, further described as a single family residential dwelling, with brown stucco walls, dark brown wood trim, a brown composition roof, and a[n] attached garage. The numbers 1410 appear on the wall next to the front door, and on the curb directly in front of the residence.

3) 736 Mustang circle, city of Walnut, county of Los Angeles, further described as a two story single family dwelling with an attached garage, white stucco walls, with brown wood trim. The numbers 736 are painted on the curb directly in front of the residence on the curb.

4) 13921 Francisquito room number 131, city of Baldwin Park, county of Los Angeles, also known as the "Travelodge Motel", a three story multi-unit motel building, with tan stucco walls and a red tile roof. Room number 131 is located on the east side of the building on the ground level. The numbers 131 are on the door.

The search shall include any and all rooms, attics, basements, garages and other parts ther[e]in. The search shall also include any and all storage units, trash receptacles and out buildings on the property of the [ ] residence.

FOR THE FOLLOWING PROPERTY:

To include any evidence of street gang membership or affiliation with a street gang; said paraphernalia to include, but not limited to, any reference to Neighborhood Crips gang (NHC); said items to include any drawings or miscellaneous writings, or objects, or graffiti depicting gang members' names, initials, logos, monikers, slogans, or containing mention of street gang membership, affiliation, activity, or identity; any paintings, drawings, photographs or photograph albums, depicting persons, vehicles weapons or locations which may appear upon observation to be relevant on the question of gang membership or association, or which may depict items sought and/or believed to be evidence in the case being investigated with this warrant, or which may depcit evidence of any criminal activity; any newspaper clippings tending to relate details or reference to any crime or crimes of violence; and any address books, listed of, or single reference to, addresses or telephone numbers of persons who may later be determined to belong to or to be affiliated with any street gangs.

Any firearms of the following caliber; 9MM. In addition to any firearms already described, any and all firearms for which the person in possession of said firearms cannot tender proof of ownership at the time of service.

To include any miscellaneous gun pieces, ammunition, gun-cleaning items or kits, holsters, ammunition belts, original box packaging, targets, expended pieces of lead, any photographs of firearms, or any paperwork showing the purchase, storage, disposition, or dominion and control over any guns, any ammunition, or any of the above items.

Your affiant requests permission to seize any articles of personal property tending to establish the identity of persons who have dominion and control over the premises, automobiles, or items to be seized, including, but not limited to, rent receipts, utility bills, telephone bills, miscellaneous addressed mail, personal letters, personal identification, keys, purchase receipts, sales receipts, tax statements, photographs, vehicle pink slips, and vehicle registration. Your affiant believes that these items will tend to connect the premises, persons, locations, and vehicles to be searched with t[h]e items to be seized and the case being investigated. Your affiant believes these items are not the type normally disposed of and can therefore be found at the location(s) to be searched.

AND SEIZE IT IF FOUND and bring it forthwith before me, or this court, at the courthouse of this court. This Search Warrant and Affidavit was sworn to and subscribed before me on

5/20/93 at 2:20 ~~a.m.~~/p.m. Wherefore, I find probable cause for the issuance of this Search Warrant and do issue it.

Dan T. Oki
(signature of magistrate)
Judge of the ~~Superior~~/Municipal Court. _ CITRUS ___ Judicial District

---

(AFFIDAVIT)

___ Michael Ferrari ___, being sworn, says that on the basis of (name of affiant) information contained within the Search Warrant and Affidavit and the attached and incorporated Statement of Probable Cause, he has probable cause to believe and does believe that the property sought pursuant to the Search Warrant is lawfully seizable pursuant to Penal Code Section 1524 and is now located at the locations set forth in this Search Warrant. Wherefore, affiant prays that this Search Warrant be issued and that it may be served at any time of day OR NIGHT (strike OR NIGHT if not applicable).

Michael Ferrari
(signature of affiant)

---

*Unless endorsed for nighttime service, this warrant can be served only between 7:00 a.m. and 10:00 p.m.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LAWRENCE PERKINS, CLARA PERKINS, APRIL PERKINS, minor, by and through her Guardian ad Litem, LAWRENCE PERKINS, Plaintiffs, vs. THE CITY OF WEST COVINA, et al., Defendants.	No. CV 93-7084 SVW (CTx)

DEPOSITION OF LAWRENCE PERKINS, taken on behalf of Defendants, at 225 South Lake Avenue, Pasadena, California, commencing at 10:05 A.M., Friday, February 25, 1994, before Linda J. Engstrom, CSR #5307, pursuant to Notice.

* * *

[p. 17] A. City of Industry.

Q. Do you know the actual address?

A. I believe it's 918 Stimson.

Q. And in what city, City of Industry?

A. Yes.

Q. What is the name of a supervisor at –

MR. SMITH: I'm going to – go ahead.

MS. HOVIND: There was a lost-earnings claim here.

MR. SMITH: Okay.

THE WITNESS: Any supervisor or my immediate supervisor at that time?

MR. SMITH: That's what I was going to object to as to vague, but go ahead.

Q. BY MS. HOVIND: Give me the name of your employer again.

A. United Stationers.

Q. United Stationers.

And what was the name of your immediate supervisor in May of 1993?

A. Ron Alvarez.

Q. How is his last name spelled?

A. I don't know.

Q. Do you know his telephone number?

A. No.

[p. 18] Q. Do you know any telephone number to United Stationers?

A. Yes.

Q. What is that?

A. 961-0011.

Q. And the area code?

A. (818).

Q. And what do you do at United Stationers?

A. I am a machine operator, stocker.

Q. And how long have you worked at United Stationers?

A. Since November of '85.

Q. Do you work full time?

A. Yes.

Q. Have you worked full time since November of 1985?

A. Yes.

Q. Are you paid on an hourly basis or by salary?

A. Hourly.

Q. What was your hourly wage in May of 1993?

A. Ten – ten-something an hour.

Q. How many children do you have?

A. One. One – I have three in all, but

* * *

[p. 36] Police Department.

Q. BY MS. HOVIND: No, how did you come to learn or understand that Lt. Schimanski was the supervisor of the detectives that searched your home?

A. When I – I called West Covina and asked for their supervisor and they told me who he was.

Q. Do you recall the gist of the conversation that occurred with Lt. Schimanski that day?

A. Yes, I do.

Q. Can you tell me in general what was said by each of you?

A. Yes. I talked to Ferrari, and he told me I could come get my personal belongings, and when I went to get them, I couldn't get them. So when I went back home, I called and asked for his boss, and that's when I got him over the telephone. And he told me that they had no right telling me that I could come get my personal belongings.

Q. Which particular belongings did you want to –

A. All of them.

Q. Okay. Was there anything else that Lt. Schimanski told you during that conversation that you now recall?

[p. 37] A. I don't remember.

Q. Is it your specific recollection that Lt. Schimanski told you during that conversation that he had personally been involved in the search of your home?

A. Yes, he told me he had been out to my home.

Q. Did he say whether it was during the search at issue or subsequent to that?

A. All he said, he had been out to my home.

Q. Do you recall the context of that statement, why he was talking about the fact he'd been out to your home?

A. No.

Q. Have you had any other conversations with Lt. Schimanski?

A. Since that day?

Q. Right.

A. I don't remember.

Q. Do you know who Mike Ferrari is?

A. Yes.

Q. And who is he?

A. One of the detectives that entered my home.

Q. Have you ever met any of these three [p. 38] people prior to your home being searched –

A. No –

Q. – in May of 1993?

A. – no.

Q. Have you seen any of them since the day your home was searched?

A. Sure.

Q. And who have you seen since the search?

A. Ferrari, Mel[ny]k. That's it, just those two.

Q. Just those two?

A. Uh-huh.

(Ms. April Perkins and Ms. Brown left the deposition room.)

Q. BY MS. HOVIND: Do you have any reason to believe that any of these three individuals has any personal prejudice or ill will against you or your family members?

A. No.

Q. Let's go through the photographs of your home, and I'm going to ask you some questions about them.

If you'll look at the photograph that's been marked No. 1 – well, you know, before we do all

* * *

[p. 51] Q. We'll get to those, then, when we go through the photographs.

What was your thought when you saw the damaged door?

A. I thought someone had broke in.

Q. What was your next step? Did you continue inside the home, or did you leave?

A. I walked through the house.

Q. What room do you enter when you go through that side door?

A. A little hallway where the washing machine and then the kitchen.

Q. When you saw the little room with the washing machine in it, did you see anything misplaced or unusual?

A. Not in that area.

Q. You then proceeded into the kitchen?

A. Uh-huh.

Q. Was it at that time that you saw this document that –

A. No –

Q. Okay.

A. – no, I didn't.

Q. How long was it after you entered your home that you saw this document referred to as "Search [p. 52] Warrant: Notice of Service"?

A. I can't give you approximate time because I went through the house looking, making sure there wasn't anyone in the house, just taking my time looking, making sure, because I thought it was just a regular break-in.

Q. Did you own a gun at that time?

A. Yes, I did.

Q. Did you look for that gun?

A. The first thing I looked for was that shotgun.

Q. Let's take it step by step.

How many rooms do you have at your residence at 531 Balham?

A. Including the living room, the kitchen and the bathroom, or just the bedrooms?

Q. All the rooms.

A. Kitchen, living room, bedroom, bedroom, bedroom, bathroom, six rooms.

Q. Three bedrooms –

A. Three bedrooms –

Q. – and one bathroom?

A. – one bathroom, kitchen and living room.

Q. When you walked into the kitchen area, [p. 53] that was unusual?

A. No.

Q. What is the next room that you went into?

A. My bedroom.

Q. Was there anything unusual in your bedroom?

A. Entering the bedroom was unusual.

Q. What was it about the entry to the bedroom that was unusual?

A. The door was broken open.

Q. Had the door been closed when you last were home?

A. Closed and locked.

Q. Is there a reason you lock your bedroom door?

A. Sure.

Q. Why is that?

A. No one goes in our bedroom we not there. We keep it locked all times.

Q. Is there a reason you keep that room locked –

A. Yes –

Q. – and not others?

A. – because –

* * *

[p. 59] Q. Go ahead.

A. Because that's where I keep my shotgun at, and money.

Q. Do you normally keep your cash at home?

A. No.

Q. When you say "money," what do you mean?

A. We were saving money for my wife's trip to see her mother.

Q. How much money did you have saved for that purpose?

A. We had $2500 saved for that purpose. She spent $40 of that.

Q. Do you have a checking or savings account at any bank?

A. Yes, I do.

Q. Which do you have?

(Ms. April Perkins and Ms. Brown left the deposition room.)

THE WITNESS: Well –

MR. SMITH: I'm going to –

Q. BY MS. HOVIND: Is there a reason that that money was not in the bank and was instead in your home?

A. Yes, it was.

[p. 60] Q. And what is that reason?

A. I was going to buy the tickets for them to go to Alabama.

(Ms. Brown entered the deposition room.)

Q. BY MS. HOVIND: So you'd planned to purchase the tickets with that cash?

A. Uh-huh.

Q. Is that a "yes"?

A. Yes.

Q. Had that money been in a bank and been withdrawn?

A. No.

Q. So you had always kept that amount of cash at home?

A. We saved the money out of our checks.

Q. Had any of that $2400 ever been in the bank?

A. No.

Q. Is there a reason that it wouldn't be in the bank?

A. Yes, it was.

Q. And what is that?

A. I was going to purchase the tickets for my wife and my daughter and her grandkids to go and [p. 61] visit her mother.

Q. How long had that amount of cash been in your bedroom?

A. Not that long.

Q. Can you estimate for me how long?

A. I cannot estimate. How long it takes you to save up money.

Q. You can't estimate about how much you saved a month toward that purpose?

A. I originally received a check from a escrow account of $1700, and that was in there.

Q. Do you know when you received that check?

A. No, I don't.

Q. So you cashed that check and then brought the $1700 home; correct?

A. Sure, yes.

Q. Can you give me any estimate as to how long you had had that amount of cash, say over $1,000, in your bedroom?

A. No, I cannot.

Q. Would you say it was more than a month?

A. Yes, it was more than a month.

Q. More than two months?

A. I cannot say.

[p. 62] Q. Did you purchase the tickets to Alabama?

A. No.

Q. What was it that you noticed about the door to the bedroom? Can you tell me specifically how it was broken.

A. Looked like somebody had kicked it.

Q. Was there a hole or a dent in the door?

A. No, no hole. Where the lock goes, it was broken right in there. We have pictures of that.

Q. Was the door open or closed to the bedroom?

A. When I came home?

Q. Right.

A. It was open.

Q. Did you notice anything unusual inside the bedroom?

A. Yes, I did.

Q. Can you tell me everything that you noticed that was out of place in the bedroom.

A. Everything was out of place in the bedroom.

Q. Can you give me some idea of what those items were?

A. Yes, my clothes, papers, stuff that I had underneath the waterbed, everything.

* * *

[p. 183] A. Maybe – maybe about – during this time?

Q. Just during the whole year.

A. Oh, mostly just during that time.

Q. So you worked eight hours a day for most of 1993?

A. Yes, eight, nine, ten, sometime twelve.

Q. So you left work early during those two weeks because you were preoccupied – would that be fair to say – with the search?

A. Yes.

Q. Do you know how much income you lost from leaving work early due to the search?

A. Not exactly. I could get that information.

MR. SMITH: Let me just take a quick break.

(A recess was taken.)

Q. BY MS. HOVIND: You mentioned that you first contacted Detective Ferrari right after you came home on the day of the search; correct?

A. Uh-huh, yes.

Q. And you've already related the substance of that conversation –

A. Yeah –

Q. – correct?

[p. 184] A. – uh-huh.

Q. And you said that when your wife got home, you would go to see him?

A. Uh-huh.

Q. Did you do that?

A. Yes.

Q. Did you go that day?

A. Yes.

Q. With your wife?

A. Yes.

Q. And did the three of you speak?

A. No.

Q. What happened?

A. He left before we got there.

Q. Did you know what time he would be there until that day?

A. He said he would be there until we got there.

Q. And what time did you go to the station?

A. Maybe around 4:30, something like that, time my wife got in.

Q. Did you call before going to the station?

A. Sure, I – I talked to him earlier. He said he would be waiting to talk to us, he wanted to [p. 185] talk to us.

Q. Was there any discussion at that time about when you would go to the station?

A. Yes, I told him just as soon as my wife got in from work.

Q. Did you have any discussion about what time that would be?

A. I told him it would be around 4:00, 4:30.

Q. Did you subsequently meet with or talk to Detective Ferrari?

A. Yes, the following Monday.

Q. Did you call him on that day?

A. I don't quite remember. Oh, no, they told us that he would be in that morning, Monday. He wouldn't be back in till Monday morning.

Q. Did you go to the station on Monday morning?

A. Yes.

Q. Who did you go with? Did you go with anybody to the station?

A. My wife.

Q. Did you meet with Detective Ferrari at that time?

A. Oh, yes.

[p. 186] Q. Do you recall what you said to him and what he said to you, in general, during that meeting?

A. I – I asked him why was – why did he do this, and the only thing he would tell me was that my house was involved in a robbery and a homicide.

Q. Did he tell you any names or any more information?

A. He told me – all – he told me that nothing or anyone in my home was involved in anything. Now, he told me that and I asked him what – give me my – give me my property back, and he didn't do it.

Q. Did he ever mention the name Marcus Marsh to you?

A. No.

Q. Has anyone since that time ever mentioned Marcus Marsh to you –

A. No –

Q. – in connection with the search of your home?

A. – no.

MR. SMITH: Let me just take a quick –

MS. HOVIND: Counsel is conferring with the deponent.

MR. SMITH: Yes, that's why I said I would like to take a break.

* * *

[p. 195] me, that, but just he gave me a number to call the property department at West Covina Police Department. When I called there, the guy that I was supposed to talk to told me that he wanted to see me. And when I went down – that's when he was telling me that he had a witness that was willing to come to court and say that Marcus discussed something that happened at my kitchen table with me and my wife. If I would just agree to that and say that he discussed this with us, he would get my stuff back for me – from the –

Q. Let me back up a second.

When Detective Ferrari referred to a son, did he refer to that son by name?

A. No, he didn't.

Q. So he never gave you a name? He just said, "I hope you don't have a son" –

A. No, he said, "I hope you raise your daughter better than you did – better than your son."

Q. And there was never any mention at any time of that son's name?

A. No.

Q. Was it when you were meeting in person with Detective Ferrari or when you were speaking to him on the phone that he was asking you to make up a conversation or testify to a conversation that occurred [p. 196] between Marcus Marsh and your family?

A. A conversation that supposedly occurred between Marcus and my family?

Q. Right.

A. It was in person.

Q. Were you alone with him at that time?

A. No, April were with me.

Q. April is?

A. My daughter.

Q. So the three of you were meeting with Detective Ferrari?

A. The two of us.

Q. Right, I'm sorry. You're right.

And tell me, to the best of your ability, his exact words when he was telling you how you could get your property back.

MR. SMITH: He just told you that.

MS. HOVIND: I want to hear it again.

MR. SMITH: Well, I'm going to object.

MS. HOVIND: I didn't catch it before, and I want to ask follow-up questions about it.

MR. SMITH: Well, all right. Go ahead.

THE WITNESS: He – if I –

MR. SMITH: You have to pay attention to the answers; otherwise, we'll be here all day asking [p. 197] questions over again.

MS. HOVIND: We may be here all day.

THE WITNESS: If I would say that Marcus discussed whatever happened when it happened with me and my wife.

Q. BY MS. HOVIND: Let me stop you there. Did he say what this discussion was about?

A. No.

Q. So those were his exact words?

A. I can't say those were his exact words, but he never did say what supposedly had happened.

Q. Okay, Go on.

A. And he had a witness that would testify in court that – that he discussed this with me and my wife sitting at our kitchen table.

Q. But he never said what the discussion was about?

A. He never did say what the discussion was about.

Q. Did you ask what the discussion was about?

A. I just told him no one had discussed any discussion with me and I wasn't going to lie on anyone.

Q. So you told him that Marcus Marsh had [p. 198] never discussed anything with you at the kitchen table?

A. Never discussed anything at the kitchen table. In fact, I hadn't even seen Marcus or talked to him.

Q. Do you know what time period Detective Ferrari was referring to when he discussed this conversation at the kitchen table?

A. No.

Q. Did you ask him?

A. Have – no, I didn't. He just said he would get my stuff back if I said he discussed whatever I told that happened with me and my wife.

MR. SMITH: Let me just take a break.

(A recess was taken.)

Q. BY MS. HOVIND: What did you say to Detective Ferrari when he made those statements to you?

A. Can you repeat the statement, please.

Q. When he made the statements about if you testify that that conversation occurred at the kitchen table between Marcus Marsh and you and your wife, what did you tell him when he made that statement to you?

A. I told him I couldn't – I didn't know anything about that, you know. I couldn't answer that. I couldn't implicate anyone in that, something I didn't know anything about, and he hadn't discussed anything [p. 199] with me and my wife.

Q. When you say "anything," what do you mean?

A. I mean, I was under the impression that since he was saying that my home was involved in a homicide and a robbery, he may have been trying to say that Marcus did that and he wanted me to implicate Marcus in that. Just to get my stuff back, I'm not going to lie on anyone.

Q. Was that your assumption –

A. That was my –

Q. – or did you ask?

A. That was my assumption.

Q. So when you said that Marcus Marsh had never discussed "anything" with you, you meant that he had never discussed a homicide or a burglary with you?

A. Right.

(Ms. April Perkins
and Ms. Brown left
the deposition room.)

Q. BY MS. HOVIND: How many meetings have you had with Detective Ferrari since the date of the search?

A. Maybe around three.

Q. And were all those meetings to try and

* * *

[p. 205] Q. Was that, would you say, a large part of your emotional distress or a small part of it?

A. That was the – that was the main part of my emotional distress, fear for my family in a unsecured home.

Q. Did you say you haven't talked to anybody at the sheriff's department about the search?

A. L.A. County Sheriff's Department I hadn't.

Q. Have you ever spoken to any person associated with the Orange County Sheriff's Department or Police Department about the search of your home?

A. No.

Q. Did Detective Ferrari ever tell you that he does not object to the return of your money or property?

A. I don't remember him telling me that.

Q. Did anyone ever tell you that the police department is not entitled to return your property without a court order?

A. That they are – repeat the question.

Q. Has anyone ever told you that a court order is required for the release of your property from the West Covina Police Department?

A. I found out later, yes. I believe is [p. 206] the – that man Schimanski told me that.

Q. Do you recall when Lt. Schimanski told you that?

A. No, I don't.

Q. Have you made any effort to get a court order to get your property back?

A. Yes, I have.

Q. And what have you done in that regard?

A. I went to the courts to get a court order.

Q. And when did you do that?

A. I don't remember exact date.

Q. Can you estimate about how long after the search you did that?

A. Maybe about a month after the search.

Q. Was there an application that you were told to fill out?

A. No.

Q. What were you told when you went to the court?

A. It wasn't anything in the courts under my name.

Q. Which court did you go to?

A. West Covina.

Q. Municipal court?

[p. 207] A. I went to – they told me to go to some little place up there, the – so I could see the judge and give him a – what is that, a book – no, a case number.

Q. Who told you this?

(Ms. Clara Perkins entered the deposition room.)

THE WITNESS: Oh, I don't – I don't remember who told me that, but Ferrari gave me a case number that wasn't a case number at all. And when he finally gave me what's supposed to have been the right case number, I carried it there, and they told me they had nothing in the courts under my name.

Q. BY MS. HOVIND: Do you know which judge, if it was a judge, told you that?

A. No, it wasn't a judge. I – judge – I suppose was the same judge that signed that, Judge Oki.

Q. And did you see Judge Oki?

A. No.

Q. I didn't hear you before that. Did you say you were told to see Judge Oki?

A. It's Ferrari told me I had to see Judge Oki, the one that signed that. But he was supposed to have been on vacation, so I was going to see – they said any judge could release it, so I went to this [p. 208] little room to see about seeing a judge, but they had nothing in the courts under my name.

Q. Has anyone ever told you that you need to fill out an application for a court order to get your property back?

A. No.

Q. Have you ever filled out any documents to try to get a court order to get your property back?

A. No.

Q. And no one has ever told you that's the method to use?

A. No.

Q. If you knew that that's what you had to do, would you do it?

A. I would have done it.

Q. Is there any other property damage that you attribute to the search of your home that day that you haven't yet testified to?

A. No, other than my sofas being cut up. That's about it.

Q. Do you have photographs of the damage to your sofa?

A. No, I did not take photographs of that because it was – it was – I didn't know about it at the time.

• • •

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LAWRENCE PERKINS, CLARA PERKINS, APRIL PERKINS, minor, by and through her Guardian ad Litem, LAWRENCE PERKINS,	)	
Plaintiffs,	)	No. CV 93-7084 SVW (CTx)
vs.	)	
THE CITY OF WEST COVINA, et al.,	)	
Defendants.	)	

DEPOSITION OF CLARA MAE PERKINS

February 25, 1994

• • •

[p. 15] THE WITNESS: No.

Q. BY MS. HOVIND: To your knowledge, have any of your children ever been arrested by the West Covina Police Department?

MR. SMITH: Well, I think that – you can ask about April, but I think it's too tenuous. The case is still on hold. There's a bias if your family's been arrested, so I will let you ask it about April but not with regard to any of the other ones.

Q. BY MS. HOVIND: I assume that your nine-year-old daughter, April, hasn't been arrested.

A. No.

Q. Did you graduate from high school?

A. Yes.

Q. And what year was that in?

A. '64.

Q. Have you received any post-high-school training or education?

A. No.

Q. And you're presently employed; correct?

A. Yes.

Q. And where is that at?

A. Stanley Hardware in San Dimas.

Q. Do you know the address of Stanley Hardware?

[p. 16] A. 300 Arrow Highway.

Q. What is your telephone number there?

A. The area code (909) 599-6881.

Q. Did you miss any work – well, let me ask you first: Were you working at Stanley Hardware at the time of the search?

A. Yes.

Q. How long have you worked at Stanley Hardware?

A. Twenty-one going – it will be twenty-two years in March.

Q. That's impressive. What do you do there?

A. I run a machine.

Q. Did you miss any work at Stanley Hardware as a result of the search in this case?

A. I took off one day.

Q. Was that considered a sick day, a personal day, or did you receive less in your paycheck as a result?

A. Yeah, I took one of my vacation days.

Q. Are you paid by the hour or salary?

A. Hour.

Q. And how much did you make per hour in April of 1993?

* * *

[p. 75] A. Yeah, – Yeah, yeah.

Q. Is it your understanding that the County of Los Angeles paid you that money to compensate you for the damage to your interior and exterior doors?

A. For the – yeah, damage.

Q. Have you ever been a party to a lawsuit before?

A. No.

Q. Did you experience any emotional problems as a result of this search?

A. No more than just being upset because I couldn't – couldn't go see my mother and take my kids. Basically, that was all, about it.

Q. Was that the day of the search you were precluded from doing those things?

A. Well, see, they took my money. I thought I could get it back and go on, but then I found out they wasn't even going to give it back to us.

Q. Who were you going to go visit?

A. My mother.

Q. And where did she live?

A. Alabama.

Q. Were you going to visit anybody else?

A. It was just her.

Q. Other than being upset at not being able

* * *

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LAWRENCE PERKINS, CLARA PERKINS, APRIL PERKINS, MINOR, BY AND THROUGH HER GUARDIAN AD LITEM, LAWRENCE PERKINS,	)	
PLAINTIFFS,	)	NO. CV93-7084 SVW (CTX)
VS.	)	
THE CITY OF WEST COVINA, A POLITICAL SUBDIVISION OF THE STATE OF CALIFORNIA; DETECTIVE FERRARI; DETECTIVE MELNYK; LIEUTENANT SCHIMANSKI; THE COUNTY OF LOS ANGELES, A POLITICAL SUBDIVISION OF THE STATE OF CALIFORNIA, AND DOES 1 THROUGH 50, INCLUSIVE,	)	
DEFENDANTS.	)	

DEPOSITION OF MICHAEL FERRARI

TAKEN ON

TUESDAY, FEBRUARY 22, 1994

REPORTED BY: VICTORIA MELEKIAN

CSR NO. 6996

* * *

[p. 77] PERKINS, DID YOU, IN BETWEEN THOSE TWO PERIODS, EVER TALK TO A SUPERVISOR CONCERNING THE RETURN OF ANY OF PERKINS' PROPERTY?

A. I DON'T BELIEVE IT WAS AT THAT TIME THAT I SPOKE TO A SUPERVISOR.

Q. APPROXIMATELY A WEEK AFTER YOU FIRST SPOKE WITH MR. PERKINS, YOU, AGAIN, HAD COMMUNICATION WITH HIM; IS THAT RIGHT?

A. CORRECT.

Q. DID HE COME TO THE STATION?

A. I BELIEVE HE DID.

Q. DID HE BRING WITH HIM RECEIPTS?

A. YES.

Q. AT THAT TIME YOU TOLD HIM HOW TO GO ABOUT GETTING A COURT ORDER TO GET HIS PROPERTY BACK; IS THAT RIGHT?

A. CORRECT.

Q. DID YOU TALK TO ANY SUPERVISOR ON THAT SUBJECT, MR. PERKINS GETTING HIS PROPERTY BACK BY A COURT ORDER AT ANY TIME AFTER THIS MEETING A WEEK AFTER THE EXERCISE OF THE WARRANT WHERE HE CAME IN AND HE SHOWED YOU HIS THINGS?

A. I BELIEVE AFTER THE SECOND MEETING, MR. PERKINS CONTINUED TO CALL BACK BECAUSE HE HAD SOME PROBLEMS WITH GETTING A COURT ORDER. I [p. 78] BELIEVE THERE WAS A POINT IN

TIME WHERE I WENT TO MY SERGEANT AND EXPLAINED THAT HE MAY BE GETTING A CALL FROM MR. PERKINS BECAUSE HE WAS NOT HAPPY WITH ME.

Q. DID MR. PERKINS INDICATE TO YOU WHAT PROBLEMS HE WAS HAVING GETTING THE COURT ORDER?

A. YES, HE DID.

Q. WHAT DID HE SAY?

A. HE SAID THERE WAS NO CASE FILED AND THAT HE COULD NOT GET A COPY OF THE SEARCH WARRANT.

Q. DID YOU OFFER TO PROVIDE HIM WITH A COPY OF THE WARRANT?

A. NO, I DID NOT.

Q. WHEN MR. PERKINS TOLD YOU HE WAS HAVING DIFFICULTY BECAUSE HE COULDN'T GET A COPY OF THE WARRANT AND THERE WAS NO CASE FILED, WHAT INFORMATION OR COMMUNICATION DID YOU HAVE WITH MR. PERKINS ON THE SUBJECT OF GETTING HIS PROPERTY BACK?

A. I GOT A LITTLE MIXED UP IN TIMES. HE INITIALLY CAME BACK AND SAID HE COULD NOT FIND ANY RECORD OF THE CASE BEING FILED WHICH WAS CORRECT, THERE WAS NO CASE FILED AT THAT POINT IN TIME. THERE WAS A SEARCH WARRANT RETURN DONE, BUT WE HAD [p. 79] THE SEARCH WARRANT SEALED BECAUSE WE WERE STILL IN THE MIDST OF AN INVESTIGATION SO IT

WAS AT THAT POINT IN TIME I TOLD HIM TO GO SEE JUDGE OKI WHO HAD SIGNED THE ORIGINAL SEARCH WARRANT SINCE HE WAS UNABLE TO LOCATE ANY CASE NUMBER TO GET ON CALENDAR.

Q. AND DID YOU HAVE A SUBSEQUENT COMMUNICATION WITH HIM WHEN HE INDICATED HE ATTEMPTED TO CONTACT JUDGE OKI?

A. YES.

Q. WHAT DID HE SAY TO YOU, AND WHAT DID YOU SAY TO HIM?

A. HE SAID JUDGE OKI WAS ON VACATION AND THAT HE WOULD BE GONE A WEEK OR TWO AND IT WAS AT THAT POINT I TOLD HIM THAT I DIDN'T KNOW WHAT MORE I COULD DO TO HELP HIM AND HE MAY WANT TO RETAIN AN ATTORNEY TO HELP HIM GET A COURT ORDER TO GET HIS PROPERTY.

Q. IS THAT WHEN YOU INFORMED YOUR SERGEANT THAT MAYBE MR. OKI – EXCUSE ME – MR. PERKINS MIGHT BE CONTACTING THE SERGEANT?

A. I BELIEVE SO.

Q. AND IS THAT BECAUSE – STRIKE THAT.

IN ANY CONVERSATION THAT YOU HAD WITH MR. PERKINS PRIOR TO THE FILING OF THIS CASE, AND

* * *

[PROOF OF SERVICE Omitted In Printing]

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER MAY 4, 1998 AREA CODE 202
CLERK OF THE COURT 479-3011

Priscilla F. Slocum
Franscell, Strickland, Roberts and Lawrence
225 S. Lake Avenue, Penthouse
Pasadena, California 91101

97-1230 – City of West Covina v. Lawrence Perkins, et al.

Dear Ms. Slocum:

The Court today entered the following order in the above stated case:

> "The motion of Sixty-seven Cities, Counties and Towns within California for leave to file a brief as amici curiae is granted. The petition for a writ of certiorari is granted."

Enclosed are Memoranda describing the procedures under the Rules, together with a Specification Chart for your use. To further assist you in preparing your case before this Court, a copy of the Guide for Counsel is enclosed.

If you have any questions, please feel free to telephone me.

Very truly yours,

WILLIAM K. SUTER, CLERK

/s/ Sandy Nelsen
Sandy Nelsen
Merits Clerk
(202) 479-3032

Enclosures

(5)

Supreme Court, U.S.
FILED
JUL 15 1998
OFFICE OF THE CLERK

No. 97-1230

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1997

CITY OF WEST COVINA,
Petitioner,

vs.

LAWRENCE PERKINS; CLARA PERKINS;
APRIL PERKINS, a minor, by and through
LAWRENCE PERKINS,
Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

PETITIONER'S BRIEF ON THE MERITS

DAVID D. LAWRENCE*
CINDY S. LEE
FRANSCELL, STRICKLAND,
ROBERTS & LAWRENCE
225 South Lake Avenue,
Penthouse
Pasadena, California 91101
(626) 304-7830
Attorneys for Petitioner

**Counsel of Record*

47 pp

QUESTIONS PRESENTED

1. Whether the procedural component of the Fourteenth Amendment's Due Process Clause requires a police department to provide legal advice and guidance concerning how to pursue *postdeprivation* judicial remedies for the return of property seized during the execution of a search warrant.

2. Where *postdeprivation* judicial remedies for return of property seized pursuant to a search warrant are held to be adequate to meet the due process requirements, whether *Parratt v. Taylor*, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981) and *Hudson v. Palmer*, 468 U.S. 517, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984) require police officers to notify claimants of the availability of those judicial remedies should they wish to claim their property.

PARTIES

The parties are Petitioner/Defendant City of West Covina and Respondents/Plaintiffs Lawrence Perkins, Clara Perkins and April Perkins, a minor, by and through Lawrence Perkins.[1]

[1] Other defendants who are not parties to this Petition include detectives Michael Ferrari, David Melny. Dario Aldecoa, James O'Brien, Dan Nalian and Wayne Heieck, Lieutenant John Schimanski and the County of Los Angeles.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES ii

OPINION 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS

STATEMENT OF THE CASE 3

A. Procedural History Of The Litigation In The District Court And Summary Of The Ninth Circuit's Opinion 3

B. Summary Of The Evidence 7

SUMMARY OF THE ARGUMENT 10

ARGUMENT 14

I. THE COURT OF APPEALS ERRONEOUSLY CREATED A NEW *NOTICE* REQUIREMENT IN *POSTDEPRIVATION* PROCEDURAL DUE PROCESS CASES IN A MANNER THAT CONFLICTS WITH THIS COURT'S DECISIONS AND DECISIONS IN OTHER CIRCUIT COURTS 14

TABLE OF CONTENTS - Continued

Page

A. Notice Of The Availability Of Internal Procedures Has Traditionally Been Required Only In *Predeprivation* Cases, Where Process Prior To Seizure Has Been Determined To Be Necessary 15

B. *Parratt v. Taylor* And *Hudson v. Palmer* Hold That Where An Executive Agency Owes No Constitutional Duty To Provide An Internal Predeprivation Procedure, Due Process Requirements Are Satisfied If The State Makes *Available* Adequate Postdeprivation *Judicial* Remedies 17

C. The New "Notice" Requirement Created By The Court Below Assumes That Postdeprivation State And Judicial Remedies Are Somehow Inadequate If The Burden Of Learning Of Their Availability And Specifics Falls On The Claimants 21

D. The Analysis Set Forth In *Mathews* And *Memphis Light* Does Not Provide Support For This Expansion Of Procedural Rights In The Context Of Post-Deprivation Remedies, Where, As Here, Plaintiffs' Property Was Seized Pursuant To A Lawful Search Warrant And There Are Adequate State and Judicially Created Remedies 25

TABLE OF CONTENTS - Continued

Page

II. SHOULD THIS COURT DETERMINE THAT MUNICIPALITIES ARE REQUIRED TO PROVIDE SOME TYPE OF "NOTICE" IN POSTDEPRIVATION CASES, THE DECISION BELOW SHOULD NONETHELESS BE REVERSED AS THE INFORMATION LEFT BY THE POLICE IN THIS CASE WAS ADEQUATE 28

III. THE NINTH CIRCUIT'S CREATION OF THIS "NOTICE" ELEMENT TO ASSESS THE ADEQUACY OF *POST DEPRIVATION* JUDICIAL AND STATUTORY REMEDIES NOT ONLY INTRUDES INTO STATES' AUTHORITY IN THE AREA OF LAW ENFORCEMENT, BUT IT ALSO PROMISES TO INTRUDE INTO OTHER AREAS WHICH HAVE TRADITIONALLY BEEN REGULATED BY THE STATES 30

A. The Decision Below Further Complicates Section 1983 Liability For Damages In Property Cases, Especially Where There Is No Systemic Problem With The State's Corrective Process 33

B. The Effects Of The Decision Below Are Far Reaching And Require Overly Burdensome Changes To Existing State Property Seizure Procedures Which Have Long Been Considered To Be Lawful . . 35

CONCLUSION 37

TABLE OF AUTHORITIES

Page

CASES

Albright v. Oliver,
510 U.S. 266, 114 S.Ct. 807,
127 L. Ed. 2d 114 (1994) 31, 32

Barnett v. Centoni,
31 F.3d 813 (9th Cir. 1994) 19

Daniels v. Williams,
474 U.S. 327, 106 S. Ct. 662,
88 L. Ed. 2d 662 (1986) 10

Decker v. Hillsborough County Attorney's Office,
845 F.2d 17 (1st Cir. 1988) 18

Dixon v. Love,
431 U.S. 105, 97 S. Ct. 1723,
52 L. Ed. 2d 172 (1977) 16

Easter House v. Felder,
910 F.2d 1387 (7th Cir. 1990) 11, 23

Fuentes v. Shevin,
407 U.S. 67, 92 S. Ct. 1983,
32 L. Ed. 2d 556 (1972) 20, 26

Graham v. Connor,
490 U.S. 386, 109 S. Ct. 1865,
104 L. Ed. 2d 443 (1989) 31

Hudson v. Palmer,
468 U.S. 517, 104 S. Ct. 3194,
82 L. Ed. 2d 393 (1984) . . . . . *passim*

TABLE OF AUTHORITIES - Continued

Page

Illinois v. LaFayette,
462 U.S. 646, 103 S. Ct. 2609,
77 L. Ed. 2d 65 (1983) 36

Mathews v. Eldridge,
424 U.S. 319, 96 S. Ct. 893,
47 L. Ed. 2d 18 (1976) . . . . . *passim*

Memphis Light, Gas, & Water Div. v. Craft,
436 U.S. 1, 98 S. Ct. 1554,
56 L. Ed. 2d 30 (1978) . . . . . *passim*

Minsky v. City of Los Angeles,
(1974) 11 Cal. 3d 113, 520 P.2d 726 36

Mullane v. Central Hanover Bank and Trust,
339 U.S. 306, 70 S. Ct. 652 (1950) 14

Murphy v. Collins,
26 F.3d 541 (5th Cir. 1994) 19

New Alaska Dev. Corp. v. Guetschow,
869 F.2d 1298 (9th Cir. 1989) 19

North Laramie Hand Co. v. Hoffman,
268 U.S. 276 (1925) 29

Parratt v. Taylor,
451 U.S. 527, 101 S.Ct. 1908,
68 L. Ed. 2d 420 (1981) . . . . . *passim*

Ramsey v. Board of Education of Whitley County,
844 F.2d 1268 (6th Cir. 1988) 19

TABLE OF AUTHORITIES - Continued

Page

Texaco, Inc. v. Short,
454 U.S. 516, 102 S. Ct. 781,
70 L. Ed. 2d 738 (1982) . . . . . *passim*

United States v. An Article of Device "Theramatic",
715 F.2d 1339 (9th Cir. 1983) 11, 24

United States v. Edwards,
415 U.S. 800, 94 S. Ct. 1234,
39 L. Ed. 2d 771 (1974) 36

Vicory v. Walton,
721 F.2d 1062 (6th Cir. 1983) 33

CONSTITUTIONS

U.S. Const. Amend. XIV . . . . . *passim*

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 1

42 U.S.C. § 1983 . . . . . *passim*

Cal. Gov't Code § 26640 36

Cal. Penal Code § 1535 . . . . . 2, 7, 12

Cal. Penal Code § 1536 . . . . . *passim*

Cal. Penal Code § 1540 . . . . . *passim*

TABLE OF AUTHORITIES

Page

Cal. Penal Code § 4403 36

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 1

42 U.S.C. § 1983 . . . . . *passim*

Cal. Gov't Code § 26640 37

Cal. Penal Code § 1535 . . . . . 2, 8, 13

Cal. Penal Code § 1536 . . . . . *passim*

Cal. Penal Code § 1540 . . . . . *passim*

Cal. Penal Code § 4403 37

OTHER AUTHORITIES

Federal Rules of Civil Procedure, Rule 56 3

OPINION

The Opinion of the United States Court of Appeals for the Ninth Circuit is reported in *Perkins v. City of West Covina*, 113 F.3d 1004 (9th Cir. 1997). A copy of the Opinion is annexed in the printed appendix to the petition for certiorari as Appendix A ("Pet.App. A".).

JURISDICTION

The opinion of the Court of Appeals was filed on May 9, 1997. A timely petition for rehearing and suggestion for rehearing en banc was denied by order filed October 22, 1997; a copy of the order is annexed in the printed appendix to the petition for certiorari as Appendix F ("Pet.App. F".) The underlying action arose under the Civil Rights Act of 1871, 42 U.S.C. § 1983 and the district court's jurisdiction was based on 28 U.S.C. § 1331. Jurisdiction of this Court was invoked under 28 U.S.C. § 1254(1). Petitioner's Petition for Writ of Certiorari was filed in the Supreme Court on January 20, 1998 (Supreme Court Case No. 97-1230). This Court's order granting certiorari was issued on May 4, 1998.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution, Section 1, provides, in pertinent part: ". . . No State shall . . . deprive any person of life, liberty, or property, without due process of law;. . ."[2]

---

[2] A complete copy of this constitutional provision is annexed in the printed appendix to the petition for certiorari as Appendix G.

The Civil Rights Act of 1871, 42 U.S.C. § 1983, *as amended by* Act of Oct. 19, 1996, 110 Stat.3853, provides, in pertinent part: "Every person, who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, . . ."[3]

California Penal Code § 1535 provides: "OFFICER TO GIVE RECEIPT FOR PROPERTY TAKEN: When the officer takes property under the warrant, he must give a receipt for the property taken (specifying it in detail) to the person from whom it was taken by him, or in whose possession it was found; or, in the absence of any person, he must leave it in the place where he found the property."

California Penal Code § 1536 provides: "All property or things taken on a warrant must be retained by the officer in his custody, subject to the order of the court to which he is required to return the proceedings before him, or of any other court in which the offense in respect to which the property or things taken is triable."

California Penal Code § 1540 provides: "PROPERTY, WHEN TO BE RESTORED TO PERSON FROM WHOM IT WAS TAKEN. If it appears that the property taken is not the same as than described in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the magistrate must cause it to be restored to the person from whom it was taken."

---

[3] A complete copy of this statutory provision is annexed in the printed appendix to the petition for certiorari as Appendix H.

Petitioner (Defendant/Appellant below) City of West Covina ("City") filed its certiorari petition on January 20, 1998 seeking review of a judgment entered on May 9, 1997 of the Ninth Circuit reversing the final judgment of the United States District of the Central District of California, pursuant to Federal Rules of Civil Procedure, Rule 56, in favor of City and against Respondents (Plaintiffs/Appellees below): Lawrence Perkins, Clara Perkins, and April Perkins, a minor, by and through Lawrence Perkins, in plaintiffs' civil rights action seeking damages for the deprivation of their procedural due process rights.

◆

STATEMENT OF THE CASE

A. Procedural History Of The Litigation In The District Court And Summary Of The Ninth Circuit's Opinion

Plaintiffs and Respondents Lawrence, Clara and April Perkins (hereinafter "plaintiffs" or "Perkins") sued the City of West Covina (hereinafter "City") and various detectives and officers of the City, initially alleging various Fourth Amendment violations arising out of an execution of a search warrant in connection with a murder investigation involving a former boarder. (J.A. 7-11.)[4] Several items, including a "starter pistol" and $2,469.00 in cash, were seized from plaintiffs' residence during the execution of the warrant on May 21, 1993. (J.A. 84.)

---

[4] Specifically, plaintiffs' complaint alleged that officers of the West Covina Police Department searched plaintiffs' home without probable cause, caused damage to plaintiffs' property during the search, seized money from plaintiffs home and conducted the search in a manner that far exceeded the scope authorized under the warrant. (J.A. 7-9.)

On May 10, 1994, the district court granted summary adjudication in favor of the individual officers with respect to several of plaintiffs' Fourth Amendment claims and granted summary adjudication in favor of the City insofar as the claims against the City were based upon the officers' search of plaintiffs' residence. (Pet.App. B 4.) However, the district court postponed ruling on an *unalleged* procedural due process claim, i.e., that the *postdeprivation* judicial remedy for return of the seized property was inadequate, and ordered further briefing from the parties. (Pet.App. B 6-7.) Plaintiffs never filed an amended complaint adding this unalleged claim, and the district court did not rule on this claim prior to entry of the final judgment. (Pet.App. D 2.)

Judgment was entered in favor of all defendants on August 4, 1994, and plaintiffs appealed on August 31, 1994. (J.A. 65; Pet.App. C.) However, on April 30, 1996, the Ninth Circuit remanded the case to the district court to clarify and resolve the procedural due process issue, i.e., plaintiffs' claim that the City violated due process by failing to provide adequate postdeprivation procedure for the recovery of seized property. (Pet.App. D 2.)

The District Court's Findings and Conclusions on Limited Remand. On the limited remand, the district court issued an order stating that the postdeprivation due process claim was not resolved during the prior proceedings and invited the parties to file a motion for summary judgment to attempt to resolve the claim. (Pet.App. E 2.) Accordingly, the City filed a motion for summary judgment and the plaintiffs filed a cross-motion for summary judgment. (Pet.App. E 2.) After a hearing and having considered the arguments made by the parties, the district court granted summary judgment in favor of the City, holding that plaintiffs waived any claim concerning the adequacy of the postdeprivation judicial remedy provided

by California Penal Code section 1536. The district court reasoned that the waiver rule applied because:

> '[t]he evidence shows at most that the plaintiff [Lawrence Perkins] made one trip to the Municipal Court, was advised that there was no file in his name and ceased any efforts to obtain an order returning his property. He filed nothing, he made no inquiry about the procedures . . . .'

(Pet.App. E 7.)

The district court also refused to excuse plaintiffs' failure to avail themselves of this judicial/statutory remedy on the grounds that the City failed to give "notice" of the remedy, finding that plaintiff Lawrence Perkins "was told that he had to get a court order to get his property back, he was told what court and what judge to go to, and he was given the date of the warrant and of the search." (Pet.App. E 7.) Therefore, "[t]he City's failure to give Perkins formal notice of the procedure did not render that procedure 'inadequate to the point that it [wa]s meaningless or nonexistent.'" (Id.)

The Ninth Circuit's Opinion. On appeal, a two-judge majority of the Ninth Circuit Court of Appeals reversed summary judgment in favor of the City, and directed the district court to enter summary judgment in favor of the plaintiffs. The Court of Appeals determined that under well established legal precedent, there was "no requirement of a prior hearing before the seizure of possessions under the search warrant." (Pet.App. A 14-15.) The court also found that California Penal Code sections 1536, 1540, and state mandamus procedures, provided "adequate" postdeprivation judicial remedies to recover the property. (Pet.App. A 17.) The Court of Appeals acknowledged that plaintiffs were told by a City police officer that they had to obtain a court order for the return of the property, and

acknowledged that the officers executing the warrant left a note at the search site which stated:

> To Whom it May Concern:
>
> 1. These premises have been searched by peace officers of the West Covina Police Department pursuant to a search warrant issued on 5-20-93, by the Honorable Dan Oki, judge of the Municipal Court, Citrus Judicial District.
> 2. The search was conducted on 5-21-93. A list of the property seized pursuant to the search warrant is attached.
> 3. If you wish further information, you may contact Detective Ferrari or Det. Melnyk at [telephone number].

(J.A. 76-77; Pet.App. A 4-5.) The form also listed "Lt. Schimanski"'s name and his telephone number. (J.A. 77; Pet.App. A 5.)

The Court of Appeals also acknowledged that "the search warrant was listed in a public document with the court clerk by the address where the search occurred, along with the number of the search warrant." (Pet.App. A 6.) Nonetheless, the court held that the City violated plaintiffs' procedural due process rights by failing to provide adequate postdeprivation "notice" of this judicial remedy which, according to the court, was required under *Memphis Light, Gas, & Water Div. v. Craft*, 436 U.S. 1, 98 S. Ct. 1554, 56 L. Ed. 2d 30 (1978), and the balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). (Pet.App. A 17-20.) Specifically, the court below concluded that the City violated plaintiffs' rights by failing to include in the note left at the search site "the availability of a judicial remedy should [they] wish to claim [their] property," or to "provide some guidance for invoking that remedy." (Pet.App. A 18.) The court held that, at minimum, the "note" left on the premises must not

only include the information which was provided in this particular case, but also the following:

> the notice must inform the recipient of the procedure for contesting the seizure or retention of the property taken, along with any additional information required for initiating that procedure in the appropriate court. In circumstances such as those presented by this record, the notice must include the search warrant number or, if it is not available or the record is sealed, the means of identifying the court file. It also must explain the need for a written motion or request to the court stating why the property should be returned.

(Pet.App. A 22.)

At the same time, however, the Court of Appeals correctly acknowledged that the trial court, not police officers, has exclusive authority over the procedures for obtaining the release of seized property:

> [o]fficers seizing property do so on behalf of the court for use in a judicial proceeding, and they must respond to court orders to release the property. (Citation). The officers have no right in the property or in its possession, *and have no authority over it except as the court may order*. (Citation [emphasis added].)

(Pet.App. A 16.)

B. Summary Of The Evidence

When the warrant authorizing the search of plaintiffs' residence was issued by the municipal court, it was sealed because it was connected to an ongoing murder investigation. (J.A. 45.) Pursuant to California Penal Code section 1535, the City police left at the plaintiffs'

home an inventory sheet which listed 17 items seized pursuant to the warrant, including a starter pistol and cash in the sum of $2,469. (J.A. 84.) Attached to the inventory sheet, the City police also left a form called "Search Warrant: Notice of Service." (J.A. 76-77.) This form stated: "If you wish further information, you may contact Det. Ferrari" or another detective, and gave their telephone numbers. It also identified the searching agency (West Covina Police), gave the date that the warrant was issued (May 20, 1993) as well as the date of the search (May 21, 1993), and identified the issuing court and judge (Dan Oki of the Citrus Municipal Court). (J.A. 76-77.)

Following the search of plaintiffs' residence, Detective Ferrari filed the search warrant and the return of search warrant with the criminal clerk of the Citrus Municipal Court. (J.A. 45.) Even though the search warrant was sealed, it was listed in a public document with the criminal court clerk by the address where the search occurred, along with the number of the search warrant. (J.A. 45-46; Pet.App. A 6.)

Shortly after the execution of the search warrant, Mr. Perkins contacted the police department regarding the property seized from his residence. Mr. Perkins was advised that a court order was required for the release of his property from the police department. (J.A. 122.) He was further advised to go see Judge Oki who had signed the original search warrant. (J.A. 40, 124.) Mr. Perkins contends that about one month after the execution of the search, he attempted to get a court order for the release of his property by going to the Citrus Municipal Court. (J.A. 122-123.) He claims that he was advised by court personnel that Judge Oki was on vacation and that he would be gone a week or two but that any judge could release the property. (J.A. 40, 124.) Mr. Perkins attempted to obtain an order for the release of the property by providing his name only. (J.A. 124.) When he was purportedly advised that there was nothing in the court

under his name, he ceased any efforts to obtain an order for the return of his property. (J.A. 123-124.) He did not submit any kind of written request, fill out any form, go back to the court on any other occasion, or make any other inquires in any manner to the court. (J.A. 124; Pet.App. E 7.) Rather, he merely contacted the police department to advise that he had been unable to obtain a court order for the release of his property, at which point the suggestion was made by Detective Ferrari that Mr. Perkins may want to retain an attorney to assist him in getting a court order. (J.A. 40.)

Even after plaintiffs retained counsel prior to or in December of 1993 in connection with their instant lawsuit, plaintiffs and their counsel did nothing to obtain a court order for the release of the seized property. Plaintiffs' counsel was aware of the search warrant number as early as January 26, 1994 and at the latest, March 15, 1994. (J.A. 70.) However, even having the search warrant number, plaintiffs' counsel did nothing to obtain an order for the release of the property seized. (J.A. 70.) In fact, it was only in response to the City's motion for summary judgment that the office of plaintiffs' counsel even contacted the Citrus Municipal Court on May 2, 1994 and inquired about obtaining the number for the subject warrant. (J.A. 77.)

When it became apparent to the City's counsel that plaintiffs were going to attempt to rely on their own lack of effort to support their contention that the West Covina Police Department was wrongfully maintaining custody of their seized property, the City's counsel prepared and filed on May 17, 1994, a request and proposed order releasing the seized property to the plaintiffs or their counsel which was signed by the judge on June 17, 1994 (J.A. 69.) On June 24, 1994, upon receipt of the June 17, 1994 court order, the police department released all items referenced in the order, including the cash, to plaintiffs. (J.A. 71, 85.) The starter pistol, however, was not released since

the police department determined from a crime report that the pistol was reported stolen from a local high school. (J.A. 71.)

SUMMARY OF THE ARGUMENT

1. By imposing a constitutional duty on police officers to advise persons whose property has been seized pursuant to a search warrant of the existence and specifics of the state and judicially created postdeprivation remedies, the decision below adds a due process requirement that is neither supported by case law nor the Due Process Clause. This new procedural due process right to legal advice under the guise of an expanded "notice" requirement cannot be reconciled with the holdings and rationale of *Parratt v. Taylor*, 451 U.S. 527, 544, 101 S. Ct. 1908, 1917, 68 L. Ed. 2d 420 (1981), overruled in part on other grounds, *Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986) and *Hudson v. Palmer*, 468 U.S. 517, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984), which hold that if a state executive agency[5] is not required to provide a hearing prior to the seizure of a property interest, procedural due process is satisfied as long as adequate postdeprivation *judicial* remedies *are made available* to the claimant. The rationale behind these decisions is that the predeprivation notice that has been traditionally required under the Due Process Clause is simply impracticable or otherwise not necessary – either because the state cannot know when such deprivations will occur (such as in situations where the deprivation of property is occasioned by random or unauthorized acts) or because of the necessity of quick action by the state (such as in situations where the

[5] The term "executive agency" refers to any public agency charged with the responsibility of implementing the laws or regulations of the State of California.

deprivation of property occurs pursuant to a search warrant). Accordingly, this Court has held that in situations where no predeprivation hearing is required, due process is satisfied where there is an adequate postdeprivation remedy.

While the court below correctly found that plaintiffs in this case had an adequate postdeprivation remedy under state law, it erroneously held that due process was violated by having failed to advise plaintiffs of the availability of this state remedy and provide guidance for invoking the remedy. This holding assumes that a state or judicially created remedy is not adequate if the burden of the knowledge of its procedures falls on the claimants. This assumption contravenes *Texaco, Inc. v. Short*, 454 U.S. 516, 102 S. Ct. 781, 70 L. Ed. 2d 738 (1982), where this Court held that where a statute sets forth the procedures for protecting property interests, claimants affected by the statute are charged with knowledge of its procedures. Moreover, *Parratt* and *Hudson* do not suggest that state judicial remedies will be rendered meaningless or inadequate if an executive agency--which has no authority over the remedies--fails to provide legal advice concerning the availability of the remedies and guidance for invoking them. Rather, the holdings of *Parratt* and *Hudson*, as well as various circuit decisions, have made clear that a state law judicial remedy is not "inadequate" simply because a claimant has the burden of requesting the judicial relief sought, or because the judicial road to recovery may be lengthy or burdensome. (*See also*, *United States v. An Article of Device "Theramatic"*, 715 F.2d 1339, 1342 (9th Cir. 1983) and *Easter House v. Felder*, 910 F.2d 1387, 1405-06 (7th Cir. 1990)).

2. *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 98 S. Ct. 1554, 56 L. Ed. 2d 30 (1978), does not provide support for the Court of Appeals' creation of this new procedural due process right. In *Memphis Light*, this

Court held that a municipal agency had a constitutional duty to provide a procedure for disputing utility bills prior to discontinuance of gas and electricity because the utilities were essential to the health and safety of citizens, and even a brief cessation could result in serious health and safety concerns. *Id.* 436 U.S. at 20, 98 S. Ct. at 1566. The constitutional duty to provide adequate "notice" of these *internal administrative* procedures was part and parcel of the agency's Constitutional duty to provide a meaningful opportunity to be heard *prior to the loss of life-essential utility services.*

No one is asserting that a city police department is required to provide a hearing prior to the seizure of property under a search warrant. (Pet.App. A 14.) Furthermore, in this case, the postdeprivation remedies are provided under state law, not by any city ordinance or internal procedure. In other words, the entity (municipality) here, unlike in *Memphis Light*, did not create and has no control over the *postdeprivation* judicial remedies. In that regard, the court below erroneously assumed that the judicial remedies set forth in Penal Code sections 1536 and 1540, and the inventory receipt which officers are required to leave at the scene of a seizure under Penal Code section 1535, constitute "City" policies which subject the City to *Monell* liability. (Pet.App. A 13.) While the "practice" of leaving an inventory receipt of property is required by section 1535, it does not follow that the inventory receipt constitutes some sort of "written notice" which gives rise to a constitutional duty to provide legal advice concerning available judicial remedies.

By imposing section 1983 liability under the guise of an expanded "notice" requirement, the Court of Appeals has imposed upon police officers and other city officials, who are not attorneys, the obligation of providing legal advice on matters outside their knowledge or control. The court effectively created an entirely new right to legal

advice concerning *postdeprivation* judicial remedies that finds no support in *Memphis Light*.

3. Should this Court find that city police officers are required to provide some type of "notice" in *postdeprivation* cases, the decision below should nonetheless be reversed as the information left by the City's police officers in this case sufficiently apprised plaintiffs of information essential to invoke state remedies. The form left by the police officers at plaintiffs' residence which identified the searching agency (West Covina Police), gave the date that the warrant was issued (May 20, 1993) as well as the date of the search (May 21, 1993), and identified the issuing judge and court (Dan Oki of the Citrus Municipal Court) (J.A. 76-77) cannot be said to have been meaningless under the traditional principles of Due Process notice.

While the decision below requires the police department to include the "search warrant number or, if it is not available or the record is sealed, the means of identifying the court file," plaintiffs produced no evidence that the lack of a search warrant number otherwise precluded them from obtaining a court order. To the contrary, when Mr. Perkins was advised by court personnel that there was no file under his name, he ended his inquiry rather than attempt to invoke the procedure by using the information that was contained in the form left by the police. Moreover, the additional information required by the court below (i.e., that the notice "must explain the need for a written motion or request to the court stating why the property should be returned") imposes an undue burden on police officers and city officials as they have no authority or control over how the court administers judicial remedies, just as they have no authority or control over how court personnel identify their various cases and files.

Furthermore, this newly fashioned right cannot be limited in any principled manner—the right exists any time

state law provides a judicial remedy for official deprivation of private interests. Accordingly, as more fully set forth below, the City's failure to provide plaintiffs formal notice of the procedure to obtain a court order for release of the property did not render that procedure inadequate to the point that it was meaningless or nonexistent.

ARGUMENT

I. THE COURT OF APPEALS ERRONEOUSLY CREATED A NEW *NOTICE* REQUIREMENT IN *POSTDEPRIVATION* PROCEDURAL DUE PROCESS CASES IN A MANNER THAT CONFLICTS WITH THIS COURT'S DECISIONS AND DECISIONS IN OTHER CIRCUIT COURTS

This Court's decisions, as well as the decisions in other circuit courts, have recognized two categories of procedural due process claims, and have articulated frameworks for determining whether the particular procedures at issue provide due process. In circumstances requiring a *predeprivation* hearing, this Court has held that notice of such a hearing and an opportunity to be heard prior to the deprivation are necessary because:

> The fundamental requisite of due process of law is the opportunity to be heard. (Citations). This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.

Mullane v. Central Hanover Bank and Trust, 339 U.S. 306, 70 S. Ct. 652, 657 (1950). Accordingly, this Court has developed and applied the *Mullane* standard of "notice reasonably calculated, under all the circumstances, to

apprise interested parties of the *pendency of the action*," in the context of *predeprivation* procedures.

However, the reasons for requiring such notice simply do not apply to the second category of cases involving *postdeprivation* judicial or statutory remedies designed to correct a deprivation that has already occurred. This is because there is no "pending action" of which the interested party must be informed. Rather, the remedies pre-exist and a hearing takes place only if the interested party decides to invoke the process. In such cases, there is no need to provide notice since it is the claimant who has generated the hearing.

While the court below correctly recognized that seizure of property under a search warrant may occur without a prior hearing, it erred in creating a new procedural due process right to legal advice under the guise of an expanded "notice" requirement in postdeprivation cases

A. Notice Of The Availability Of Internal Procedures Has Traditionally Been Required Only In *Predeprivation* Cases, Where Process Prior To Seizure Has Been Determined To Be Necessary

This Court has employed the balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), to determine whether Due Process requires some form of notice and hearing prior to the deprivation of a property or liberty interest. The *Mathews* balancing test requires consideration of the following three factors:

> First, the private interest affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute

> procedural safeguards; and finally, the Government's interest, including the function involved, and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 336, 965 S. Ct. at 903.

In *Mathews*, this Court weighed a disability claimant's interest in continued disability benefits, the fairness and reliability of existing pre-termination procedures, the probable value of additional procedural safeguards, and the burden of such additional safeguards, and concluded that due process does not require an evidentiary hearing prior to the discontinuance of disability benefits. *See also*, *Dixon v. Love*, 431 U.S. 105, 112-115, 97 S. Ct. 1723, 1727-29, 52 L. Ed. 2d 172 (1977) (no evidentiary hearing required under *Mathews* factors prior to revocation of license for outstanding traffic tickets because respondent has opportunity for full judicial hearing in the underlying traffic convictions); *see also*, *Memphis Light, Gas, & Water Div. v. Craft, supra*, 436 U.S. at 16-19, 98 S. Ct. at 1564-65, (the *Mathews* factors require a municipal utility company to provide notice of its internal procedures for protesting the proposed termination of utility services *before* termination—notice of dispute resolution procedures prior to terminating utility service held to be inadequate).

Accordingly, in *predeprivation* cases, a public entity (usually, an administrative agency) has authorized certain procedures to be followed before a deprivation can occur and the due process analysis is whether the "notice" given and the procedures made available provide a meaningful opportunity to be heard prior to the deprivation of a property or liberty interest. However, the requirement of notice reasonably calculated to apprise interested parties of the pendency of the action, which is the central inquiry in analyzing predeprivation cases, is inapplicable where, as

here, plaintiffs' property was seized pursuant to a lawful search warrant, without the need for a predeprivation hearing.

B. *Parratt v. Taylor* And *Hudson v. Palmer* Hold That Where An Executive Agency Owes No Constitutional Duty To Provide An Internal Predeprivation Procedure, Due Process Requirements Are Satisfied If The State Makes *Available* Adequate Postdeprivation *Judicial* Remedies

This Court has held that if a state executive agency[6] is not required to provide a hearing prior to the seizure of a property interest, procedural due process is satisfied if adequate postdeprivation *judicial* remedies *are made available* to the claimant. *Parratt v. Taylor*, *supra*, 451 U.S. at 544, 101 S. Ct. at 1917; *Hudson v. Palmer*, *supra*, 468 U.S. 517, 104 S. Ct. 3194. The rationale behind these decisions was the recognition that:

> [E]ither the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking . . . satisf[ies] the requirements of procedural due process.

Id. at 541, 101 S. Ct. at 1916; *Id.* at 533, S. Ct. at 3203.

In *Parratt v. Taylor*, a state prisoner sued prison officials under 42 U.S.C. § 1983, alleging that their

---

[6] The term "executive agency" refers to any public agency charged with the responsibility of implementing the laws or regulations of the State of California.

negligent loss of a hobby kit he ordered from a mail-order catalog deprived him of property without due process of law. After balancing the relevant interests, this Court determined that the normal "predeprivation notice and opportunity to be heard" was "pretermitted" or "impracticable" under the circumstances. Therefore, this Court held that "the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking . . . satisf[ies] the requirements of procedural due process." *Id.* at 539, 101 S. Ct. at 1915. Since the state tort claims act provided an adequate post-deprivation remedy, notwithstanding the fact that the state remedies may not provide the plaintiff with all the relief which may have been available if he could have proceeded under § 1983, procedural due process was found to be satisfied. (*Id.* at 543, 101 S. Ct. at 1915).

Similarly, in *Hudson v. Palmer*, a prisoner alleged that during the search of his cell, a prison guard deliberately and maliciously destroyed some of the prisoner's possessions. This Court determined that correctional officers were not in a position to provide a predeprivation procedure, and that under Virginia law, the prisoner's right to sue the correctional officer for conversion or detinue provided all the process that was due. *Id.* at 534-35, 104 S. Ct. at 3204. This Court rejected plaintiff's argument that state law remedies should be deemed inadequate because they were "far from certain and complete," observing the fact that an injured party "might not be able to recover under [state law] remedies the full amount which he might receive in a section 1983 action is not . . . determinative of the adequacy of the state remedies. (Citation)."*Id.* at 535, 104 S. Ct. at 3204-05.

Following the rationale of *Parratt* and *Hudson*, circuit courts have also held that procedural due process is satisfied where the state provides an adequate postdeprivation remedy. *See*, *Decker v. Hillsborough*

County Attorney's Office, 845 F.2d 17, 22 (1st Cir. 1988) (state's failure to return a criminal defendant's property to him immediately upon his acquittal did not constitute deprivation of property without due process because the state statute provided judicial procedures through which to assert his property right); *Murphy v. Collins*, 26 F.3d 541, 543 (5th Cir. 1994) (no procedural due process violation where prisoner's property confiscated in violation of the prison's procedures because prisoner could pursue a tort action for conversion); *Ramsey v. Board of Education of Whitley County*, 844 F.2d 1268, 1272 (6th Cir. 1988) (no procedural due process violation where school district unilaterally reduced teacher's compensation for sick leave days because teacher could pursue breach of contract action); *Barnett v. Centoni*, 31 F.3d 813, 816 (9th Cir. 1994) (no procedural due process violation where a state inmate's prison status was downgraded in a disciplinary action because California law provided an adequate post-deprivation remedy for any property deprivation); *New Alaska Dev. Corp. v. Guetschow*, 869 F.2d 1298, 1305 (9th Cir. 1989) (the *availability* of "post-deprivation state law remedies provides all the process due" for a court-appointed receiver's alleged misappropriation of funds in a divorce proceeding); *Economic Dev. Corp. v. Stierheim*, 782 F.2d 952, 955-56 (11th Cir. 1986) (state law tort remedies provide all the process that is due even if relief under section 1983 would be greater).

As in the foregoing cases, including *Parratt* and *Hudson*, the City in this case was not required to hold a predeprivation hearing. This Court articulated the following reasons why seizure of property under a search warrant may occur without a prior hearing:

> First, a search is generally issued to serve a highly important governmental need—*e.g.*, the apprehension and conviction of criminals—rather than the mere private advantage of a private party

> in an economic transaction. Second, a search warrant is generally issued in situations demanding prompt action. The danger is all too obvious that a criminal will destroy or hide evidence of fruits of his crime if given any prior notice. Third, the Fourth Amendment guarantees that the State will not issue search warrants merely upon the conclusory application of a private party. It guarantees that the State will not abdicate control over the issuance of warrants and that no warrant will be issued without a prior showing of probable cause.

Fuentes v. Shevin, 407 U.S. 67, 93-93 n.30, 92 S. Ct. 1983, 2001, 32 L. Ed. 2d 556 (1972).

While the specific fact making a meaningful predeprivation hearing "impracticable" in *Parratt* and *Hudson* was the deprivation of property occasioned by a random and unauthorized act by a state employee, thereby making it impossible for the state to predict when the loss would occur, the necessity of quick action by the state that has long been recognized in connection with search warrants rendered a meaningful predeprivation hearing unnecessary in this instant case.

Accordingly, all that was required to satisfy procedural due process in this case was the availability of an adequate postdeprivation procedure for the return of the seized property. As the court below recognized, plaintiffs had available to them, a postdeprivation procedure for the return of the seized property in the form of a "nonstatutory" motion under California Penal Code section 1536 and a motion under Penal Code section 1540. (Pet.App. A 17.) Because these various remedies were found to "satisfy the requirements of due process" (Pet.App. A 17), the City did not violate plaintiffs' procedural due process rights and the Court of Appeals' decision holding otherwise should be reversed.

C. The New "Notice" Requirement Created By The Court Below Assumes That Postdeprivation State And Judicial Remedies Are Somehow Inadequate If The Burden Of Learning Of Their Availability And Specifics Falls On The Claimants

While the Court of Appeals correctly recognized that plaintiffs had available to them adequate postdeprivation statutory and judicial remedies for the return of the seized property, it erroneously placed the burden of providing "notice" of the existence and specifics of these state and judicially created postdeprivation remedies on the City's police officers. The Court of Appeals' creation of this new procedural due process right to "notice" in postdeprivation cases is not only contrary to legal precedent, but also to common sense and common understanding, for a variety of reasons.

First, as the court below acknowledged, under California law, the authority over these judicial remedies is vested exclusively in the court system. (Pet.App. A 16.) As such, the judicial remedies in this instant case are indistinguishable from the category of judicial or statutory remedies available to civil rights plaintiffs in cases such as *Parratt v. Taylor*, *supra*, *Hudson v. Palmer*, *supra*, and numerous decisions in the circuit courts of appeal. None of these cases even remotely suggest that due process requires a municipality, which has no authority over the property in question or the procedures necessary to invoke these remedies, to provide advance legal advice or information concerning how to pursue the remedies after a deprivation has occurred but before an aggrieved party invokes the judicial remedy.

Secondly, this new procedural due process right to legal advice under the guise of an expanded "notice" requirement ignores the general rule that a person is charged with knowledge of statutory provisions which

affect their substantive rights. *Texaco, Inc. v. Short*, *supra*, 454 U.S. 516, 102 S. Ct. 781. In *Texaco*, a state statute provided that a severed mineral interest automatically reverts to the surface owner of the property if not used by the mineral owner for 20 years, unless the mineral owner files a statement of claim in the local county recorder's office. The statute did not require notice, but "set forth a procedure. . . by which the surface owner who succeeded to the ownership . . . may give notice that the mineral interest has lapsed." Appellant mineral owners failed to avail themselves of the claim procedure and their property reverted to the surface owners. Appellants claimed that the statute violated their due process rights because "the State of Indiana did not adequately notify them of the legal requirements of the new statute." *Id.* at 352, 102 S. Ct. at 793. This Court rejected the argument outright:

> The first question raised is simply how a legislature must go about advising its citizens of actions that must be taken to avoid a valid rule of law . . . The answer to this question is no different from that posed for any legislative enactment affecting substantial rights . . . . It is well established that persons owning property within a State are charged with knowledge of relevant statutory provisions affecting the control or disposition of such property.

(*Id.* at 533, 102 S. Ct. at 793-794.)

As in *Texaco, Inc. v. Short*, plaintiffs in this case and others whose rights are affected by the various California Penal Code provisions relating to the seizure and return of their property are "charged with the knowledge" of the legal requirements contained in these statutes. By imposing a constitutional duty on police officers to advise persons whose property has been seized pursuant to a search warrant of the existence and specifics of the state and

judicially created postdeprivation remedies, the decision below contravenes the holding in *Texaco*.

Moreover, the opinion below suggests that a state judicial remedy is not "adequate" if, in the absence of legal assistance, the remedy is burdensome and lengthy. However, in *postdeprivation* cases, the available judicial or statutory remedies are not inadequate simply because recovery might be difficult, time-consuming, speculative, or uncertain. *Parratt v. Taylor*, *supra*, 451 U.S. at 543-44, 101 S. Ct. at 1917 (since the state tort remedy was available at the time of the plaintiff's loss and he failed to use it, he failed to state a procedural due process claim); *Hudson v. Palmer*, *supra*, 468 U.S. at 535, 104 S. Ct. at 3204-05 (this Court rejected plaintiff's argument that state law remedies should be deemed inadequate because they were "far from certain and complete.").

Judicial remedies simply have not been deemed inadequate simply because a claimant has not been aware of the available remedy, or has had difficulty in trying to invoke the remedy. To the contrary, in *Easter House v. Felder*, *supra*, 910 F.2d at 1405-06, plaintiff, a daycare provider, sued a state licensing agency and its employees for allegedly depriving it of a property interest because of the agency's delay in renewing the provider's daycare license. The court held that various post-deprivation tort remedies provided all the process that was "due" even though "the state road to recovery" might be a "lengthy and speculative process":

> We note that almost all litigation, whether conducted in a state or federal forum, may be characterized as a lengthy and speculative process. Litigants often decry the speed with which court's administer justice and likewise lament that a particular forum may yield a more favorable result depending upon the nature of the claim and the

> particular position they support. However, we should not reject the application of *Parratt* unless the remedy which an injured party may pursue in state court can be readily characterized as inadequate to the point that it is meaningless or nonexistent and, thus, in no way can be said to provide the due process relief guaranteed by the Fourteenth Amendment.

Id. at 1406; *see also, United States v. An Article of Device "Theramatic"*, *supra*, 715 F.2d at 1342-43 (rejecting plaintiff's claim that a post-seizure judicial hearing was inadequate because it put the "burden on defendant to request a hearing").

Clearly, none of these decisions even remotely suggests that an executive agency's failure to "notify" a claimant "of the availability of a judicial remedy" and "provide some guidance for invoking that remedy" will render the postdeprivation judicial remedy inadequate. Indeed, the Court of Appeals' opinion ignores the fact that a section 1983 "postdeprivation" remedy might well be more cumbersome than the judicial procedures provided by California law.

Simply put, the decision below is based on the same argument repeatedly *rejected* by this Court and other circuit courts, namely, that a post-deprivation remedy is inadequate if the remedy is burdensome, lengthy, uncertain, or speculative.

D. The Analysis Set Forth In *Mathews* And *Memphis Light* Does Not Provide Support For This Expansion Of Procedural Rights In The Context Of Post-Deprivation Remedies, Where, As Here, Plaintiffs' Property Was Seized Pursuant To A Lawful Search Warrant And There Are Adequate State and Judicially Created Remedies

The analysis set forth in *Mathews v. Eldridge*, *supra*, and applied in *Memphis Light*, *supra*, provides no support for the Ninth Circuit's expansion of procedural rights in the context of post-deprivation remedies. In *Memphis Light*, this Court held that a municipal utility agency subject to control by the municipality had a constitutional duty to provide "notice" of available internal administrative procedures for disputing utility bills *prior* to discontinuance of gas and electricity. 436 U.S. at 4, 14-15, 98 S. Ct. at 1557, 1563. Three critical facts, absent in the present case, were essential to this Court's determination. First, because the utilities were deemed to be "essential" to the health and safety of citizens, and even a brief cessation could result in serious health and safety concerns, the *Mathews v. Eldridge* factors required a municipal utility company to provide a predeprivation hearing. 436 U.S. at 4, 19-20, 98 S. Ct. at 1537, 1559, 1565.

Second, the municipal utility company had authority over the "res" in question, namely, the services deemed to be "essential" to its customers.

Third, the municipal utility company had developed dispute resolution procedures as required by state law. *Id.* at 15, n. 16, 98 S. Ct. at 1563. Pursuant to that authority, the utility developed detailed *internal* procedures for the resolution of disputed bills prior to a proposed termination. *Id.* at 5, n. 4, 13, 98 S. Ct. at 1559, 1562 ("'The billing of customers, the determination as to when a final notice is

sent, and the termination of service [are] governed by policies, rules and regulations adopted and approved by the Board of Commissioners of MLG&W.' (Citation)."). In other words, the municipal utility's duty to provide such procedures and its *authority* over the distribution of the property at issue gave rise to a constitutional duty to provide adequate "notice" of its internal administrative procedure prior to a termination of *life-essential* utility services.

In the present case, the City's police officers were not required to provide a predeprivation hearing for seizures of property pursuant to a search warrant. In essence, the factors set forth in *Mathews v. Eldridge, supra*, have already been weighed in determining whether some form of predeprivation notice and hearing is required. Because the private property interest affected by the official action is negligible compared to the highly important governmental need (*e.g.*, the apprehension and conviction of criminals), the risk of erroneous deprivation of such interest is relatively low given that the Fourth Amendment guarantee that the state will not issue warrants merely upon the conclusory application of a private party, and the requirement of an opportunity for an adversary hearing before a search warrant is issued will defeat its very purpose as a search warrant is generally issued in situations demanding prompt action, this Court has never implied that the Due Process Clause is violated where seizure of property under a search warrant occurs without a predeprivation hearing. *Fuentes v. Shevin, supra*, 407 U.S. at 93, n. 30, 92 S. Ct. at 2001.

Moreover, the procedures at issue are not procedures created and periodically modified by the City. They are creatures of state law. It makes sense to require the municipal utility company in *Memphis Light* to give notice of its own procedures, for who else could reliably do so. But when the procedures are provided by state law, all

plaintiffs have to do is look to the statutes. *See, Texaco, Inc. v. Short, supra*, 454 U.S. at 533, 102 S. Ct. at 793-794. ("It is well established that persons owning property within a State are charged with knowledge of relevant statutory provisions affecting the control or disposition of such property.")

Furthermore, unlike *Memphis Light*, a California municipality has no authority over the disposition of property seized pursuant to a search warrant. As the Court of Appeals acknowledged, California *courts* have exclusive authority over such property, and the city police officers cannot release such property except by court order. (Pet.App. A 16.) While a municipality may have information that might be helpful to pursue these remedies, it does not follow that it has a constitutional duty to provide that information after a deprivation has already occurred and before an aggrieved party seeks to invoke the remedy. *Cf. Hudson v. Palmer*, 468 U.S. at 534 (rejecting argument that "because an agent of the state who intends to deprive a person of his property can provide predeprivation process, then as a matter of due process he must do so.")

Nonetheless, the Court of Appeals, on pain of section 1983 liability, has imposed an on-going *constitutional* duty on city police officers to research, monitor, and identify potential weaknesses in court procedures relating to the return of seized property, and to provide information concerning these court procedures after a deprivation has occurred but before the remedy is invoked by an aggrieved party. This result not only ignores this Court's decisions relating to post-deprivation remedies--which place the burden on an aggrieved party to avail himself of "adequate" post-deprivation judicial or statutory remedies--but also finds no support in *Memphis Light, supra*, or *Mathews, supra*.

Because the Court of Appeals ignored these critical distinctions altogether, it is unsurprising that it also erroneously assumed that a municipality--rather than the courts or plaintiffs' counsel--was required to provide information concerning how to invoke and pursue this otherwise adequate judicial remedy.

II. SHOULD THIS COURT DETERMINE THAT MUNICIPALITIES ARE REQUIRED TO PROVIDE SOME TYPE OF "NOTICE" IN POSTDEPRIVATION CASES, THE DECISION BELOW SHOULD NONETHELESS BE REVERSED AS THE INFORMATION LEFT BY THE POLICE IN THIS CASE WAS ADEQUATE

Should this Court find that police officers are required to provide some type of "notice" in *postdeprivations* cases where property is seized pursuant to a search warrant, the decision below should nonetheless be reversed as the information left by the City's police officers sufficiently apprised plaintiffs of the information necessary to invoke state judicial remedies. The form left by the police officers at plaintiffs' residence, which identified the searching agency (West Covina Police), gave the date that the warrant was issued (May 20, 1993) as well as the date of the search (May 21, 1993), and identified the issuing judge and court (Dan Oki of the Citrus Municipal Court) (J.A. 76-77), cannot be said to have been meaningless under the traditional principles of due process notice.

While the decision below requires the police department to include the "search warrant number or, if it is not available or the record is sealed, the means of identifying the court file" (Pet.App. A 22), plaintiffs failed to produce any reliable evidence concerning what the proper court procedures were for invoking and pursuing this remedy, or what information they lacked which was necessary to pursue the remedy. (Pet.App. E 6 ["there is no evidence either way about whether one must have the warrant

number in order to obtain a court order releasing seized property"]).[7] Rather, the uncontroverted evidence established that the search warrant was listed in a public document with the court clerk by the address where the search occurred (Pet.App. A 6.). However, when Mr. Perkins was advised by court personnel that there was no file under his name, he ended his inquiry rather than attempt to invoke the procedure by using the information that was contained in the form left by the police. (Pet.App. E 7.)

The Court of Appeals' criticism of the police department's failure to mention the availability of any procedure for protesting the seizure of his property and the existence of a formal judicial procedure for obtaining return are based on two erroneous assumptions. First, as the court acknowledged, the police department advised Mr. Perkins and his counsel of this "judicial remedy," but plaintiffs failed to pursue it *through the court system*. (Pet.App. A 5, E 3.) However, it is largely irrelevant whether or not plaintiffs were informed by the *police department* what their judicial remedies were--the judicial remedies are provided by law, and plaintiffs are presumed to know the law. *See*, *North Laramie Hand Co. v. Hoffman*, 268 U.S. 276, 283 (1925) ("All persons are charged with knowledge of the provisions of statutes and must take note of the procedure adopted by them; and when the procedure is not arbitrary there are no

---

[7] The cases discussing the section 1536 procedures do not require that the applicant include the search warrant number. Nor is there any evidence that an application or motion was rejected or denied due to the absence of a search warrant number in this case. Plaintiffs simply ask the Court to assume that their hypothetical motion would have been denied since they did not have a search warrant number.

constitutional limitations relieving them from conforming to it.")

Second, the Court of Appeals references "a number of telephone calls [made by Mr. Perkins] to the city's police station . . . and a trip to the municipal court." (Pet.App. A 19.) From this premise, the court below simply concluded that the police department had a constitutional duty to inform plaintiffs of the *court's* procedures for obtaining the release of the property. (Pet.App. A 22 ["the notice must inform the recipient of the procedure for contesting the seizure or retention of the property taken"]). Unfortunately, the Court of Appeals' conclusion ignores the fact that a police department has no authority over how these judicial procedures operate. Nor does the police department have any control over how the local courts file or otherwise maintain their various cases. Furthermore, the Ninth Circuit's analysis has the practical effect of raising to constitutional dimensions every practical impediment (real or imagined) encountered by an unmotivated claimant.

III. THE NINTH CIRCUIT'S CREATION OF THIS "NOTICE" ELEMENT TO ASSESS THE ADEQUACY OF *POST DEPRIVATION* JUDICIAL AND STATUTORY REMEDIES NOT ONLY INTRUDES INTO STATES' AUTHORITY IN THE AREA OF LAW ENFORCEMENT, BUT IT ALSO PROMISES TO INTRUDE INTO OTHER AREAS WHICH HAVE TRADITIONALLY BEEN REGULATED BY THE STATES

The Ninth Circuit's use of the *Mathews v. Eldridge, supra,* analysis to create new "procedural" rights in the area of post-deprivation remedies is also inconsistent with this Court's continued efforts to prevent federal courts from converting the Fourteenth Amendment into "*a font of tort*

law to be superimposed upon whatever systems may already be administered by the States." *Parratt v. Taylor, supra,* 451 U.S. at 544, 101 S. Ct. at 1917. (*emphasis added*).

Understandably concerned with principles of comity and federalism, this Court has attempted to curtail efforts by federal courts to expand substantive and procedural rights under the Due Process Clause. Efforts to expand substantive rights under the Fourteenth Amendment were rebuked by this Court in *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989), and *Albright v. Oliver*, 510 U.S. 266, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994). In these decisions, this Court expressed concern over the constitutionalization of state law by the creation of additional "substantive" due process rights over and above those rights that are already protected under specific provisions of the Bill of Rights. 490 U.S. at 394-395, 109 S. Ct. at 1870-1871; 510 U.S. at 273-74, 114 S. Ct. at 813.

Similarly, this Court has rebuked efforts to expand procedural rights in cases such as *Parratt v. Taylor*, *supra*, and *Hudson v. Palmer*, *supra*, where a state has eliminated the need for federal protection by providing adequate post-deprivation judicial or statutory remedies. In *Parratt v. Taylor*, this Court relied on principles of comity and federalism to reject a prison inmate's argument that he had a right to predeprivation procedures even though the state provided an adequate tort remedy to compensate him for the loss of his property interest:

> To accept respondent's argument that the conduct of state officials in this case constituted a violation of the Fourteenth Amendment would necessarily result in turning every alleged injury which may have been inflicted by a state official . . . into a violation of the Fourteenth Amendment cognizable under § 1983. It is hard to perceive any logical stopping

> place to such a line of reasoning. Presumably, under this rationale any party who is involved in nothing more than an automobile accident with a state official could allege a constitutional violation under § 1983. Such reasoning "would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States. (Citation)."

Id. at 544, 101 S. Ct. at 1917.

More recently, members of this Court in *Albright v. Oliver*, *supra*, recognized the importance of these principles. In *Albright v. Oliver*, justices Kennedy and Thomas found that the availability of an alternative state remedy for malicious prosecution precluded a claim under the Due Process Clause for initiation of criminal charges without probable cause, reasoning thus:

> The common sense teaching of *Parratt* is that some questions of property, contract, and tort law are best resolved by state legal systems without resort to the federal courts, even when a state actor is the alleged wrongdoer. As we explained in *Parratt*, the contrary approach 'would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under 'color of law' into a violation of the Fourteenth Amendment cognizable under § 1983 . . . . The *Parratt* principle respects the delicate balance between state and federal courts and comports with the design of § 1983, a statute that reinforces a legal tradition in which protection for persons and their rights is afforded by common law and the laws of the states, as well as by the Constitution. (Citation.)

510 U.S. at 283, 114 S. Ct. at 818-19.

A. The Decision Below Further Complicates Section 1983 Liability For Damages In Property Cases, Especially Where There Is No Systemic Problem With The State's Corrective Process

In cases where the States have well established and adequate procedures, i.e., statutory and judicial remedies, for the return of seized property, those state procedures should not be displaced by federalized tort law under the guise of a section 1983 action. *Vicory v. Walton*, 721 F.2d 1062, 1063 (6th Cir. 1983), *cert. denied*, 469 U.S. 834 (1984) provides a persuasive analysis of the principles of comity and federalism that have informed this Court's efforts to contain efforts at constitutionalization of state law remedies. In *Vicory v. Walton*, plaintiffs, owners of a mobile trailer seized for purposes of a criminal investigation and trial, sued the City for retaining the trailer without due process of law. The Court of Appeals held that state tort remedies provided all the process that was due. *Id.* at 1065.

Foreshadowing this Court's decision in *Hudson v. Palmer*, *supra*, the Court of Appeals rejected plaintiffs' claim that the *Parratt* rule did not apply to "intentional" conduct. The court reasoned that "the principle being applied does not turn on the question of whether the claimed constitutional tort affecting property is caused by intentional conduct or negligent conduct," but reflects the Supreme Court's basic determination to limit federal hearings "in procedural due process cases that can be corrected in state court." *Id.* at 1065. Therefore,

> [s]o long as a state's damage remedies are not shown to be inadequate in theory or practice---that is, so long as there is no systemic problem with the state's corrective process---we see no purpose to be served by further complicating section 1983 liability

for damages in property cases by distinctions grounded in different types of intent, negligence and strict liability.

Similarly, in the present case, plaintiffs simply failed to present any evidence of a "systemic" problem with California's judicial remedy for the return of lawfully seized property. Rather, having obtained an unsuccessful judgment with regard to their various claims predicated under the Fourth Amendment, plaintiffs pursued an unalleged procedural due process claim rather than invoke the adequate state and judicially created remedies. Nonetheless, the Court of Appeals created a new procedural due process right to legal advice based on plaintiffs' inability (or unwillingness) in this single instance to obtain the necessary information and relief after one visit to the court. Even when plaintiffs retained counsel, no effort was made whatsoever to take the legal steps necessary to pursue this post-deprivation judicial remedy. (J.A. 70.)

In light of the foregoing decisions, it is unlikely that this Court intended the analysis set forth in *Mathews v. Eldridge*, *supra*, to be used to expand procedural rights where the only evidence of "inadequacy" of a post-deprivation judicial remedy is an aggrieved party's initial difficulty in pursuing the remedy in court. The creation of this new "notice" element to assess the adequacy of post-deprivation judicial and statutory remedies not only intrudes into state's authority in the area of law enforcement, but also promises to intrude into other areas which have traditionally been regulated by the states.

B. The Effects Of The Decision Below Are Far Reaching And Require Overly Burdensome Changes To Existing State Property Seizure Procedures Which Have Long Been Considered To Be Lawful

A municipality has no authority over court procedures governing the return of lawfully seized property, anymore than a municipality has control over the means through which a tort action can be prosecuted. Yet, in this particular case, the Ninth Circuit has imposed a burden on police departments to research court procedures--which may vary from time to time and from court to court--concerning the precise manner in which property obtained under a valid search warrant may be recovered. To avoid section 1983 liability, municipalities must fashion some sort of "notice" in the form of legal advice, continuously monitor court processes for any relevant changes in procedure, update the required legal advice to reflect any changes in the relevant court processes, and provide the necessary information after a deprivation has occurred but before an aggrieved party pursues the judicial remedy.

The Ninth Circuit's rationale for the *Perkins' notice* promises to pave the way for further federal intrusion into areas which traditionally have been relegated to the states. Indeed, it takes little imagination to predict the Ninth Circuit's next step, namely, to require public agencies--who have no authority or control over existing state law judicial and statutory remedies recognized in cases such as *Parratt v. Hudson*, *supra*, *Hudson v. Palmer*, *supra*, and numerous other circuit court decisions--to provide legal advice and guidance on invoking such remedies. In doing so, the newly created *Perkins notices* would also render several long established state statutory provisions regulating routine state property seizures constitutionally inadequate, necessitating their revision by the state legislature.

For example, it has long been recognized that when persons are arrested and incarcerated, their personal effects are "seized", inventoried and placed in official custody. *Hudson v. Palmer*, *supra*, 468 U.S. at 541, 104 S. Ct. at 3207 (Justice O'Conner concurring); *see also*, *Illinois v. LaFayette*, 462 U.S. 646, 103 S. Ct. 2609, 77 L. Ed. 2d 65 (1983). Moreover, law enforcement officers' entitlement to seize and preserve lawfully encountered physical evidence from persons has also been well established. *United States v. Edwards*, 415 U.S. 800, 809, 94 S. Ct. 1234, 1239, 39 L. Ed. 2d 771 (1974). In California, law enforcement personnel are authorized to seize and retain property from prisoners under Government Code section 26640 while Penal Code section 4403 requires that a receipt be issued to an arrested person for seized property. The available state remedy of mandamus is the established and appropriate remedy to compel the return of property seized under these sections. *Minsky v. City of Los Angeles*, (1974) 11 Cal. 3d 113, 520 P.2d 726.

The above seizures of property, otherwise considered lawful, will now have to be accompanied by a *Perkins' notice* informing the claimant of "the procedures for contesting the seizure or retention of the property taken, along with any additional information required for initiating that procedure in the appropriate court". (Pet.App. A 22.) Moreover, in accordance with the *Perkins notice*, an explanation of the "need for a written motion or request to the court stating why the property should be returned" must also be provided. (Id.). Applying the Ninth Circuit's analysis, any impediments encountered by unmotivated claimants would simply expand the constitutional obligations of the police. For example, not only could police officers be accused of the unauthorized practice of law, but state and local government entities could be sued for legal malpractice if the advice provided is incorrect, inaccurate, or otherwise construed as misleading.

Recognizing the unduly burdensome affects of this *Perkins'* type notice on state and local government resources, this Court should reject the requirements laid down by the court below.

———♦———

CONCLUSION

For the reasons hereinabove stated, the City of West Covina prays that the decision below, finding that the City deprived the plaintiffs of their procedural due process rights, be reversed and that it be awarded its costs.

Dated: July 13, 1998.

Respectfully submitted,

DAVID D. LAWRENCE*
CINDY S. LEE
FRANSCELL, STRICKLAND,
ROBERTS & LAWRENCE
225 South Lake Avenue
Penthouse
Pasadena, California 91101
(626) 304-7830
Attorneys for Petitioner

*Counsel of Record**
Admitted to the Bar of the Supreme Court on September 18, 1992

(19)

No. 97-1230

FILED
SEP 11 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

October Term, 1997

CITY OF WEST COVINA,

Petitioner,

v.

LAWRENCE PERKINS; CLARA PERKINS; APRIL PERKINS, a minor, by and through LAWRENCE PERKINS,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF ON THE MERITS

PATRICK S. SMITH
Counsel of Record
KLASS, HELMAN & ROSS
11766 Wilshire Boulevard, Suite 200
Los Angeles, California 90025-6538
(310) 277-2224; Fax (310) 470-1080

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTIONS PRESENTED

Whether due process requires that the written notice left by police officers when taking property from a residence pursuant to a search warrant include the information necessary to enable an innocent property owner to utilize the state procedure for return of the property.

Whether due process requires that the written notice left by police officers, under the circumstances presented in the record, also include the information necessary to enable the property owner to identify the procedure to obtain return of the seized property.

PARTIES TO THE PROCEEDING

Petitioner's Brief on the Merits accurately lists the parties to the proceeding in the Courts below. However, the issues presented do not involve April Perkins, the minor.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

STATEMENT OF THE CASE 1

A. Introduction 1

B. Facts 1

C. Procedural History 7

SUMMARY OF ARGUMENT 8

ARGUMENT 12

I. WHERE PROPERTY IS TAKEN DURING THE EXECUTION OF A SEARCH WARRANT, DUE PROCESS REQUIRES THAT NOTICE TO AN INNOCENT PROPERTY OWNER MUST PROVIDE NOT ONLY NOTICE THAT PROPERTY HAS BEEN SEIZED, BUT ALSO BASIC INFORMATION REQUIRED TO GUARANTEE MEANINGFUL ACCESS TO POSTDEPRIVATION REMEDIES 12

A. This Court Has Previously Recognized the Need for Notice of Remedies in Postdeprivation Contexts 13

B. In this Context, More Information than Just the Notice of the Seizure Is Required to Satisfy Due Process 16

II. THE TRADITIONAL NOTICE TEST SET OUT IN *MULLANE* AND FURTHER DEVELOPED IN *MATHEWS* ESTABLISHES THAT THE NOTICE GIVEN TO RESPONDENTS WAS INSUFFICIENT TO SATISFY DUE PROCESS 18

TABLE OF CONTENTS – Continued

Page

A. The *Mullane* Standard 18

B. *Mathews v. Eldridge* 21

1. The Private Interest at Stake 22

2. The Risk of Erroneous Deprivation and The Probable Value of Additional Procedural Safeguards 22

3. The Burden Imposed on the Government 25

4. Balancing the *Mathews* Factors 28

III. NEITHER CALIFORNIA STATUTES NOR CASE LAW PROVIDE SUFFICIENT NOTICE OF THE INFORMATION NECESSARY TO ACCESS THE POSTDEPRIVATION PROCEDURE 32

IV. THE NOTICE SUPPLIED BY PETITIONER BREAKS SHARPLY FROM THE TRADITIONAL FORM OF NOTICE SUPPLIED BY LAW ENFORCEMENT AGENCIES THROUGHOUT THE COUNTRY 37

V. IN THE ALTERNATIVE, SHOULD THE COURT DETERMINE THAT THE NOTICE REQUIREMENTS OF THE COURT OF APPEALS WENT TOO FAR, THE FINDING THAT THE NOTICE WAS INADEQUATE IS PRINCIPLED AND JUSTIFIES THE AFFIRMATION OF THE OPINION WITH MODIFICATIONS TO THE NOTICE REQUIREMENTS 39

CONCLUSION 40

TABLE OF AUTHORITIES

Page

CASES

Anderson National Bank v. Luckett, 321 U.S. 233 (1944) 32, 33, 35, 36

Boddie v. Connecticut, 401 U.S. 371 (1971) 30

Bragg v. Weaver, 251 U.S. 57 (1919) 14, 19

Cafeteria Workers v. McElroy, 367 U.S. 886 (1961) 21

Green v. Lindsey, 456 U.S. 444 (1982) 24

Hudson v. Palmer, 468 U.S. 517 (1984) 9, 16, 18, 19

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 16, 30, 37, 39

Martel v. County of Los Angeles, 56 F.3d 993 (9th Cir. 1995) 8

Mathews v. Eldridge, 424 U.S. 319 (1976) ..... *passim*

Medina v. California, 505 U.S. 437 (1992) 21

Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978) 10, 20, 30, 31, 32

Morrissey v. Brewer, 408 U.S. 471 (1961) 39

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 9, 12, 18, 19, 30

North Laramie Land Co. v. Hoffman, 268 U.S. 276 (1925) 32, 33, 34, 36

Parratt v. Taylor, 451 U.S. 527 (1981) 9, 16, 18

People v. Icenogle, 164 Cal.App.3d 620, 210 Cal.Rptr. 575 (1985) 33

TABLE OF AUTHORITIES – Continued

Page

Reetz v. Michigan, 118 U.S. 505 (1903) 32, 33, 34, 36

Schroeder v. City of New York, 371 U.S. 208 (1962) 13, 19, 21

Texaco v. Short, 454 U.S. 516 (1982) 33

Vitek v. Jones, 445 U.S. 480 (1980) 37

STATUTES

Fed.R.Crim.P. 41 .....11, 38

Fed.R.Crim.P. 41(d) 38

Penal Code 1535..... 1

Penal Code 1536..... 33

STATEMENT OF THE CASE

A. Introduction.

At issue in these proceedings is the constitutional adequacy of notice given to Respondents after the seizure of property from their home during the execution of a search warrant. Pet.App. A17. Pursuant to a policy of the City of West Covina, their police officers, after having served a search warrant on Respondents' unoccupied residence, left a form "Search Warrant: Notice of Service" document which provided only limited information regarding the seizure of the property. J.A. 76-77. The officers left the notice pursuant to a standard practice, custom, or policy of the City. Pet.App. A13. The document gave notice that, on May 21, 1993, the residence had been searched by the West Covina Police Department, pursuant to a warrant signed by Judge Oki on May 20, 1993. The notice also identified the name and phone number of the lead detectives. Pet.App. A17-18. The officers also left an inventory of the property taken. *Penal Code* 1535. The officers did *not*, however, leave a copy of the search warrant (which includes the identifying search warrant number), as most other states and federal law require. Neither did the officers leave any other information which would allow the Respondents to identify their property. As a consequence, Respondents were denied an opportunity for a hearing to seek return of their property.

B. Facts

1. Respondents live at 531 Balham Street in the City of West Covina, the location of the execution of the search warrant. Lawrence and Clara Perkins purchased their

home in 1990, for approximately $100,000.00. Lawrence is currently a machine operator at United Stationers and has been employed there since 1985. J.A. 103. Clara also a machine operator, has worked at Stanley Hardware for over 22 years. J.A. 127. Their daughter, April Perkins, is ten years old and in the fourth grade. Prior to the time of the events which led to the procurement and execution of the warrant, the Perkins had a boarder, Marcus Marsh, stay in their home. After Mr. Marsh had moved out, and completely unknown to the Perkins family, he became the subject of a murder investigation, which led to the search of the Perkins' home. Excerpts of Record before the Court of Appeals, C.R. 19 at pp. 13-21 and 27:23 to 28:1. All of the events relevant to the procurement of the warrant occurred after the time Marsh had moved out of the residence. However, because Marsh had previously identified the Perkins' household as his place of residence, the police department procured a search warrant for that and other locations in furtherance of its investigation. Excerpts of Record before the Court of Appeals, C.R. 19 at pp. 13-21 and 23-25.

2. The search of the Perkins' home occurred on the morning of May 21, 1993, after Respondents had taken their daughter to school and left for work. During the search of the home, in a locked bedroom, separate from the bedroom previously occupied by Marsh, officers found and seized a 12-gauge shotgun registered to Lawrence Perkins, numerous other items of personal property, Lawrence Perkins' adoption papers, and $2,469.00 in cash – money saved by the family for a trip by Mrs. Perkins, her child and grandchildren (from a previous marriage) to visit Mrs. Perkins' mother in Alabama. J.A.

84; 109-110; 128. In that same bedroom, telephone directories were found in the name of Lawrence Perkins and Clara Perkins. J.A. 84. No items were found which linked Marcus Marsh to the bedroom. Most of the items were seized pursuant to the terms of the warrant; the money was seized under the plain-view doctrine.

Later that day, Mr. Perkins returned from work to find his home in disarray. Upon investigation, Mr. Perkins found the form "Search Warrant: Notice of Service" and receipt for property taken left by the officers. J.A. 106-107. Mr. Perkins immediately called the one telephone number listed on the notice. J.A. 113. The number connected with Petitioner's police station, and Mr. Perkins spoke with Detective Ferrari to set up an appointment. *Id*. When the family went to the station, however, they were informed that Detective Ferrari had already left for the day and would not be back until the following Monday. J.A. 114.

3. On that following Monday, the family returned to the station and met with Detective Ferrari. J.A. 115. At that meeting, according to Respondents, Detective Ferrari, stated that, while no one in Respondents' home (presumably the family) was implicated, his house was potentially "involved" in a robbery and homicide investigation. J.A. 116. The detective and Respondents spoke about the service of the warrant, at which time Mr. Perkins requested that his property be returned to him. *Id*.

The record is unclear as to the specific order of events; however, at some point, Respondents showed Ferrari proof of ownership of the property, and Ferrari

indicated he had no objection to its return. At some point, Respondents went back to the police station to speak with the property department representative at the direction of Detective Ferrari. J.A. 117. At the station, Perkins was told by the "guy that [he] was supposed to talk to," that Detective Ferrari "wanted to see [him]." J.A. 117; 131; 104-05. During this conversation, the detective asked Respondents to testify against Marsh regarding a conversation Respondents allegedly had with Marsh at their kitchen table. If they cooperated, Ferrari said, Perkins "would get his stuff back." J.A. 117; 119. Ferrari "never did [tell Perkins] what the discussion was [purportedly] about." J.A. 119.

The record is confusing on these points, because Ferrari appeared to be operating under the assumption that Respondents knew something about the crime, when, in fact, they did not. According to Respondents, the Detective was, at best, simply not providing the factual information (the search warrant number or case name) he needed to access the courts, or, at worst, taking advantage of Respondents' persistence by attempting to leverage information from them for the Marsh criminal investigation after giving false information to lure him back to the police station. J.A. 117-121, 103-104. Ferrari, at some point, however, did tell Lawrence Perkins to go to the court to get an order releasing the property. J.A. 123. Perkins later complained to Lt. Schimanski about Detective Ferrari. Lt. Schimanski told Perkins that Ferrari "had no right telling [him] that [he] could come get [his] belongings. J.A. 104.

Overall, the record shows that Perkins talked to the detectives in the case on several occasions, J.A. 103-05;

113-16, and appeared at least twice at the police station, J.A. 39; 113-16, once with proof of ownership, J.A. 130, the second time, he thought, to get his property back. *Id.* After Respondents established ownership over the property, confirmed that they knew nothing about the events that led to the procurement of the warrant, and verified they had no information to the police, the detectives informed Perkins of his need to get a "court order." J.A. 122-124. Mr. Perkins, thereafter, went to the courthouse to attempt to obtain the return of his wrongfully seized property. J.A. 122.

4. At the courthouse, Perkins talked to various courthouse personnel. J.A. 123-124. When he encountered difficulty, Perkins sought "further information" from the detectives. According to Ferrari, after a "second meeting," Mr. Perkins "continued to call back because he had some problems with getting a court order." J.A. 130-31. Perkins was unable to get on calendar before a judge to seek return of his property. In fact, Ferrari corroborates Respondents' testimony that Mr. Perkins was hitting successive dead-ends. Ferrari states that Mr. Perkins was told that he could not get into court without a number related to the Search Warrant. J.A. 39-40; 122-124; 77-78. Ferrari stated that Mr. Perkins twice went to court; he remembers that Mr. Perkins "initially came back" and said he could find no case filed at the court. J.A. 130-131. Subsequently, and after he had been back to court, Respondents told Ferrari that they had tried to contact Judge Oki, but he was on vacation. *Id.* Perkins tried to see other judges but was told he could not "get on calendar" without the warrant, case number, or other identifying information. J.A. 124-132.

According to Ferrari, there was no case number, because no case had been filed, and no available search warrant number, because the warrant had been sealed. J.A. 39-40.

During this time, it is established that the problems Respondents encountered were a result of their not having the necessary information, i.e., the search warrant number, or case name or number, to even be allowed by the clerk's office to get into the courtroom. J.A. 131-132, 123-124.[1] Mr. Perkins' efforts were not thwarted for lack of effort, but because he was not given notice of the necessary information with which to seek recovery of his property, much less notice of the procedure to be invoked. J.A. 122-124.

Eventually, almost a year after the incident, Respondents' property was returned to them, but only after Petitioner filed a Request for Return of Property utilizing

---

[1] Defendant Ferrari claims that "to his knowledge" the warrant number was available to the public. This weak and speculative evidence of a belief is insufficient in light of Mr. Perkins' testimony and the testimony of Jeffrie Madland. J.A. 77-78. Ferrari has testified that he provided [Mr. Perkins] with the number of the search warrant which he could use in identifying the search warrant with Judge Oki when he requested the return of his property. J.A. 46. This testimony is consistent with Perkins' statement that Ferrari gave him numbers on a couple of occasions, which turned out to be wrong. J.A. 123. *However*, Ferrari's declaration is inconsistent with his testimony that the search warrant was sealed. Further, the testimony of Respondents' witness supports Perkins' claim that he would be unable to get his property back from the court without the proper information which was only in the custody of Petitioner and the court. J.A. 77-78.

the previously unidentified case number assigned the criminal filing against Marcus Marsh and the previously sealed search warrant number. That criminal case was not filed until February 9, 1994, nearly nine months after the seizure.[2]

C. Procedural History

The District Court granted summary judgment on Petitioner's claim that there existed an adequate post-deprivation procedure for the return of unlawfully seized property and that Respondents waived the remainder of their due process claim by not invoking the statutory procedure for return of property. Pet.App. E.[3] The Ninth

---

[2] The filing date of the criminal action is not a part of the record at this time. Respondents request that the court take judicial notice of this fact.

[3] Contrary to the assertion in Petitioner's Brief on the Merits, Respondents' procedural due process claim was alleged. The district court considered the Motion to Amend by Respondents, and ruled, that "the Due Process issue is bifurcated and not part of this phase of the trial." Pet.App. D2. Moreover, on the limited remand order by the Ninth Circuit requesting "clarification of the status of the bifurcated claim," the district court was given the opportunity "to conduct such further proceedings as it may deem necessary to determine the status of the due process claim. . . . " Pet.App. D2. On remand, the district court, confirmed that the claim was viably alleged when it stated that "such claim in fact was not resolved during the prior proceedings . . . " Pet.App. E2. The district court then ruled on the merits of the claim. Pet.App. E.

Respondents should not be prejudiced by the court's decision not to issue a written order granting the motion to amend. This particular district court enforces a procedure widely known as the "rocket docket," which sometimes

Circuit affirmed the District Court's ruling on the adequacy of the postdeprivation remedy but reversed the District Court's finding that Respondents' waived their due process claim. The Court of Appeals found that the notice provided by the City was constitutionally inadequate, *"in circumstances such as those presented by this record."* The Court of Appeals found that the notice denied the Perkins' family basic information with which to obtain return of their erroneously retained property.

SUMMARY OF ARGUMENT

Notice is a fundamental component of due process, regardless of the pre or postdeprivation character of a case. The United States concedes that notice is required under the circumstances presented in the record. The Petitioner does not. The case law amply supports the mandate of notice in a postdeprivation context. Where there is no opportunity for a predeprivation hearing or notice, the necessity of adequate postdeprivation notice is compelling. The notice must include the fact of the seizure, the key information about the seizure to access the procedure for securing return of property, and the means for securing the return of property. The need for notice of the seizure itself is fundamental, as the United States concedes. The need for the basic information to identify the property is also clear, for without it, the postdeprivation procedure is meaningless. Finally, the need for notice

---

sacrifices formality for efficiency. See *Martel v. County of Los Angeles*, 56 F.3d 993 (9th Cir. 1995).

of the means of securing return of property is as compelling as the need for predeprivation notice, in the circumstances such as those presented in this record. The imposition of a duty to provide this fundamental notice is consistent with the relevant line of Court precedent and merely defines notice in a postdeprivation context, without expanding or creating any new federal due process rights.

The *Parratt-Hudson* line of cases requires that, in cases where there is no need for predeprivation notice and a hearing, due process is satisfied only if a meaningful postdeprivation remedy is available. Notice, most often, will affect the meaningfulness of that postdeprivation remedy. By providing notice of only the seizure of property itself, the Petitioner deprived Respondents of the information necessary to implement the procedure for return of property and, therefore, rendered the process meaningless.

Moreover, a fundamental flaw of the Petitioner's and *Amici's* position is their assumption that there was no impending hearing affecting the disposition of the Respondent's property. This erroneous assumption led to inadequate notice being given to Respondents. The government, once it retained, as opposed to seized, the property, was engaging in nonrandom and authorized conduct which renders the Petitioner's position against notice unsupportable.

The traditional notice test set out in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and expounded upon in *Mathews v. Eldridge*, 424 U.S. 319 (1976), involves the balancing of the governmental and

private interests. This balance establishes that the notice provided to Respondents was insufficient and favors requiring the Petitioner to correct its form of notice. The burden involved in correcting the notice, which would have avoided the increased risk of erroneous deprivation of property, was minimal. The Petitioner already provided a document entitled "Search Warrant: Notice of Service" at the residence. A simple modification would satisfy due process. Additionally, there were other feasible and customary alternatives available to correct the form of notice chosen.

Reliance on *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978), is appropriate in that the Court addressed the necessity for notice in that case. Notice is a broad due process concept, the discussion of which is relevant in any context. Additionally, since there was an impending hearing looming, and any emergency in retaining the property no longer existed, the *Mathews* balancing test, applied in *Memphis Light*, was appropriately utilized. This court has engaged the *Mathews* balancing test in many types of due process cases, and it remains a useful guide.

None of the California statutes or cases cited by the Petitioner or *Amici* provide adequate notice to Respondents on the record of this case. Respondents were unable to access the procedure for return of property because they were not given the information needed to identify the property before the state court. No statute or case could have provided this factual information. Therefore, the maxim that one is charged with the knowledge of the law, is inapplicable to this case. With regard to the notice of procedures for the return of property, the cases cited in

support of Petitioner's position are irrelevant and distinguishable form the facts as presented in the record.

The notice supplied by the Petitioner is qualitatively inferior to that provided by the federal government and the majority of other states. Fed.R.Crim.P. 41, upon which most state statutes are modeled, requires that the law enforcement authority is to leave a copy of the search warrant at the residence searched. Had Petitioner complied with a similar mandate, it is likely that Respondents would have been able to retrieve their property under the appropriate procedures. The federal statute and similar state statutes betray Petitioner's position. Those agencies have adopted laws which satisfy due process; the notice provided here falls below that standard.

Finally, since due process is flexible and subject to the dictates of each particular situation, Respondents recognize that reasonable minds can differ in balancing the competing interests. However, respectfully, all reasonable minds would conclude that due process requires notice which includes the search warrant number, case name, or case number, the lack of which prevented the Perkins family from obtaining not only a meaningful hearing on their request, but also the actual return of their property. This principled holding should be affirmed by this Court. The requirement that the Petitioner give notice of the identification of the procedure is also supported by the record and Court cases. Without compromising that position, Respondents assert, alternatively, that the court should affirm the holding that the notice was less than

due process required, but does not necessarily require detailed notice of the procedure.

ARGUMENT

I. WHERE PROPERTY IS TAKEN DURING THE EXECUTION OF A SEARCH WARRANT, DUE PROCESS REQUIRES THAT NOTICE TO AN INNOCENT PROPERTY OWNER MUST PROVIDE NOT ONLY NOTICE THAT PROPERTY HAS BEEN SEIZED, BUT ALSO BASIC INFORMATION REQUIRED TO GUARANTEE MEANINGFUL ACCESS TO POSTDEPRIVATION REMEDIES.

Petitioner asserts that due process requires no notice in a postdeprivation hearing case.[4] Pet.Brief at 14-24. Petitioner cites no cases that support this assertion; rather the assertion is supported in the negative, i.e., that all the cases which address "notice" are predeprivation hearing cases, and, therefore, so it is argued, no notice is required in postdeprivation hearing cases. Petitioner is wrong. Notice is a fundamental component of due process regardless of when the hearing occurs. The United States agrees.[5]

---

[4] Petitioner states that "all that was required to satisfy procedural due process in this case was the availability of an adequate postdeprivation procedure for the return of seized property." Pet.Brief at 20.

[5] The United States concedes that notice is required in this postdeprivation context. The Solicitor General's brief recognizes that "[t]he Due Process Clause requires notice that is sufficient to make the opportunity for a hearing meaningful. *Mullane*, 339 U.S., at 314." United States Brief at 11.

A. This Court Has Previously Recognized the Need for Notice of Remedies in Postdeprivation Contexts.

In *Schroeder v. City of New York*, 371 U.S. 208 (1962), the City of New York, through its water board, instituted a condemnation proceeding whereby water was to be diverted from a river some 25 miles upstream from the plaintiff's property. The notice of condemnation proceeding was instituted not for a hearing on the right to object to the diversion, but on the City's "intention to make application to such court for appointment of commissioners of appraisal." *Id.* at 209. Under the statute, regardless of the plaintiff's right to appear at the hearing on the appointment of appraisers, a landowner had three years within which to file a claim for damages with the city.

The plaintiff filed the action alleging a due process violation claiming that she did not receive notice of the "condemnation proceedings" and, hence, did not file a claim for damages within the three-year period. The Court held that the posting of notices up and down the river, but not on Plaintiff's property, was inadequate. More importantly, however, was the Court's response to the asserted defense that the Plaintiff had notice of the diversion of the water by the change in volume of the river flow: the Court held that

> knowledge of a change in appearance of the river is far short of *notice* that the city had diverted the river *and that the appellant had a right to be heard on a claim for compensation for damages* resulting from the diversion.

Id. at 214 (emphasis added). Although the statement was in response to an issue regarding notice of the deprivation itself, the Court was clear that notice of the right to be heard on the "claim for compensation" should be included, even though the right to be heard could occur up to three years after the deprivation. Accordingly, the Court held that notice of the deprivation *and notice of the right to be heard is required,* even though the claim need not be filed for three years.

Similarly, in *Bragg v. Weaver*, 251 U.S. 57 (1919), the Court considered whether a condemnation statute that provided for postdeprivation notice and remedies "denie[d] to the owner the due process of law guaranteed by the Fourteenth Amendment." *Id.* at 58. The municipality had taken dirt from a landowner's property to repair an adjacent public highway. The landowner, among other things, contended that the statute was fatally defective, because "the proceedings may be carried from inception to conclusion without any notice to the owner, and therefore without his having an opportunity to [have a hearing]." *Id.* at 61. This Court quoted the statute in question as providing for postdeprivation notice either in person, through the landowner's presence at the compensation hearing, or by written notice thirty days thereafter. Implied in the Court's ruling that the statute was not fatally defective under the Due Process Clause is the assumption that, had the statute not provided for this postdeprivation notice, then the scheme would have been unconstitutional. Accordingly, at least

some deprivations of property, which require no predeprivation hearing, do require postdeprivation notice.[6]

The need for postdeprivation notice here is even more compelling. In a condemnation case, the municipality has the right to take specifically identified property and keep it. In this case, although Petitioner had the right to take property, the property is not specifically identified, and some of the property seized was even not identified in the warrant. Second, the right to keep property seized by eminent domain has long been established. The right to hold property seized pursuant to a warrant, however, is contingent upon a number of factors including whether the municipality appropriately identified the property seized as being within the terms of the warrant and whether the property was, in fact, otherwise related to any criminal activity. Third, in the circumstances presented in the record, Petitioner was put on notice that the property it had taken was, in fact, being erroneously detained. Fourth, if a condemnation case requires notice of a right to a hearing on compensation, then this case, *a fortiori,* requires notice, since here, unlike a condemnation case, the appropriateness of the deprivation itself was still at issue, and, in fact, was conceded by the City to be erroneous.

---

[6] Respondents assert that these are not cases which come within a "limited exception" as advanced by the United States, Brief at p.26, since there was ample time within which the aggrieved party could determine her remedies in the postdeprivation time period.

B. In this Context, More Information than Just the Notice of the Seizure Is Required to Satisfy Due Process.

This Court has broadly held that constitutional due process is flexible, demanding particular protections in particular situations. *Mathews v. Eldridge*, 424 U.S., at 334. Put another way, the Court must determine "what process was [the Perkins'] due." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982).

This Court has recognized that some takings, while not requiring a predeprivation hearing, may still satisfy due process. In those circumstances, the government must provide a meaningful postdeprivation remedy. Those cases involve "either the necessity of quick action by the State or the impracticability of providing any meaningful predeprivation process, when coupled with the availability of some *meaningful* means by which to assess the propriety of the State's action at some time after the initial taking, can satisfy the requirements of procedural due process." *Parratt v. Taylor*, 451 U.S. 527, 539 (1981) (emphasis added).

In addressing the requirements of due proc , however, Petitioner cites to *Parratt* and *Hudson v. Palmer*, 468 U.S. 517 (1984), as support for its position that no notice whatsoever is required. The *Parratt-Hudson* line of cases does not stand for the proposition that notice is not required in a postdeprivation context as the Petitioner asserts. The Petitioner's use of these cases is misplaced, since they never specifically address the issue of notice in a postdeprivation context. However, these cases do indicate that due process is not satisfied in a postdeprivation

context if the government fails to provide a remedy which is "meaningful" in both theory and practice. *Id.* at 533.

A prerequisite, then, to satisfying due process in a postdeprivation case is the existence of a "meaningful" remedy. Very often, however, notice will dictate the meaningfulness of the remedy. In practice, the inadequate notice provided by the Petitioner rendered an otherwise adequate state remedy meaningless. Respondents could not even get into court to have a hearing which, by all accounts, would have been a *pro forma* proceeding to grant the return of property. The search warrant was sealed, there was no case number as no case was filed until February of 1994, there was no listing under the name of Lawrence Perkins or Marcus Marsh; and there was no listing by address. Petitioner had no policy or custom to provide the needed information to the Perkins' family. The only seemingly useful information was the direction to call a number "for further information." This notification proved to be illusory, however, as the officers had no further useful information.

Also misplaced is the Petitioner's argument that the *Mathews v. Eldridge* analysis already has dictated that a search warrant case precludes a predeprivation hearing and has no further application. This argument is off the mark. This case is to be examined not at the time of the initial seizure, but, later, at the time of the retention of the property. At that point, it was not impracticable to provide Respondents with notice of the search warrant number, basic factual information, or of the governmental policies and procedures *vis a vis* the retention of property.

If the prerequisite of *Parratt* is a "meaningful" opportunity for a hearing, then, to the extent that Respondents could not get their property back because of the lack of information in the notice, the *Parratt* line of cases support a constitutional demand for this information to be included in the notice.

Also, the *Parratt-Hudson* line of cases concerned random and unauthorized conduct by the government resulting in the permanent and immediate deprivation of property. Here, the actions of the government were neither. This is a case, not where notice is impracticable because of the random and unauthorized nature of the deprivation, but because of the emergency in taking custody of the property. As such, once the taking has occurred, the emergency no longer exists, but the property is now being retained by the government. Consequently, to the extent that there exists an adequate postdeprivation remedy, the government no longer has an excuse for not providing adequate notice, especially where the notice is critical to insuring the meaningfulness of the procedures provided by the state.

II. THE TRADITIONAL NOTICE TEST SET OUT IN *MULLANE* AND FURTHER DEVELOPED IN *MATHEWS* ESTABLISHES THAT THE NOTICE GIVEN TO RESPONDENTS WAS INSUFFICIENT TO SATISFY DUE PROCESS.

A. The *Mullane* Standard

The starting point for due process analysis has been reiterated by the Court on many occasions. After a court has determined that there has been a deprivation of a protectable interest, the minimum requirement of due

process must be notice and an opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S., at 313. Due process requires that the notice impart information to make the opportunity for a hearing meaningful, regardless of when the hearing is to occur. *Mullane*, 339 U.S., at 314; *Schroeder, id.; Bragg, id.; Hudson, id.* Notice, under the circumstances reflected in the record, is satisfied only when it advises the person that the property has been seized, *and* imparts basic information, or the means to access that information, to enable the individual to employ publicly available laws and the procedures enacted thereunder, *i.e.*, the motion for return of property. J.A. 81. The Court of Appeals' decision recognizes that the meaningfulness of the remedy is dependent on the notice.

Here, Petitioner's notice imparted the following information: On May 21, 1993, Respondents' home was searched and property seized by Petitioner pursuant to a warrant issued by Judge Oki of the Citrus Municipal Court on May 20, 1993; for "further information," call a detective at (818) 814-8510.

While the one-page notice appears to provide information needed to access the remedy, the record reveals the contrary. The notice, after it is distilled, is limited to who took the property and under whose authority. This is "skeletal" information. Even the location whereat to appear to move to get the property back was lacking in the notice. Nevertheless, Perkins tried to fill in the gaps in the notice. He called the number for further information and was eventually told to go to court. At court, Respondents were unable to appear before a judge; their inability to obtain the necessary information prevented

them from getting on calendar to make their request. The record reveals that neither Respondents nor the court (because Respondents did not have the necessary information) could identify the warrant in question. The information that Respondents needed was in the possession of Petitioner but not included in the notice. Without the search warrant number, case name, or case number, the opportunity for a hearing was rendered meaningless.

Further, Petitioner created the illusion that Respondents would be given the necessary information by providing a telephone number to call for further information. This portion of the notice was limited in its meaningfulness. Nevertheless, the ability to access a postdeprivation remedy should not hinge upon the assistance of someone who has an interest in trying to leverage information from the person whose property has been seized.[7] Petitioner's notice requires that the individual do just that – contact the very person whose interest it is to not necessarily provide the information.

---

[7] A minority of this Court has suggested that a form notice which provides a telephone number to an adequately staffed information center, might satisfy the notice requirements of due process. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978) (Stevens, J., dissenting). Under the circumstances of this case, however, the phone was not adequately staffed in that the person who answered did not have an interest in providing the information without trying to leverage it. A finding of adequate notice in the leaving of a phone number, would, as stated above, make access to a remedy hinge upon the willingness of a detective to be forthright and not take advantage of his position.

B. *Mathews v. Eldridge*.

Petitioner proposes a purely mechanical analysis for this case in requesting that the Court deny the right to notice in all postdeprivation hearing cases. However, as this court has stated, "[d]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place, and circumstance." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961) (internal quotations omitted). As such, the "notice required will vary with the circumstances and conditions." *Schroeder*, 371 U.S., at 212. In evaluating what notice due process requires under the circumstances and conditions of this case, "[t]he balancing of equities that *Mathews v. Eldridge* outlines remains a useful guide in due process cases." *Medina v. California*, 505 U.S. 437, 453 (1992) (O'Connor, J., concurring).[8]

The Court, while sometimes limiting the application of this balancing test, has broadly stated, without strict limitation, that *Mathews* "articulate[s] a three factor test for evaluating procedural due process claims. . . . " *Id.*, at 443. Under *Mathews*, in order to identify "the specific dictates of due process [notice, in this case]," the Court is to consider, in the particular case, (1) the private interest at stake, (2) the risk if an erroneous deprivation along with the value of additional notice, and (3) the burden imposed on the government by the additional notice. *Id.*, at 335.

---

[8] *Medina* recognizes that the *Mathews* balancing test has been applied in the resolution of due process issues other than a predeprivation due process case.

1. The Private Interest at Stake

The list of property seized and retained by Petitioner is listed in the Property Receipt. J.A. 84. While the list includes a number of items, the primary items are the $2,469.00 and the family's shotgun. Obviously, the private interest at stake is significant, especially given the fact that the money was saved by a working class family for a trip from Los Angeles to Alabama to visit Mrs. Perkins' mother, a trip, incidentally, that never was able to occur. The private interest in such personal property is undeniably important.

2. The Risk of Erroneous Deprivation and The Probable Value of Additional Procedural Safeguards

There is no question that Respondents had an interest in the property at issue; the proof of ownership was submitted and the detective had no objection to the return of the property. The lack of information in the notice prevented Respondents from getting on calendar for the *pro forma* adjudication of their interest.

It is apparent in the record that the notice did not provide information that would identify under what search warrant or case the property was seized. Notice of the deprivation was provided but not any information that would allow an individual to identify under what warrant the property was held or how to obtain this needed information. The risk, as a general matter, is

substantial if one cannot identify the warrant. The impending specter of an unknown criminal filing, increases the risk of erroneous deprivation substantially, since, without the ability to adjudicate one's interest, the tendency of law enforcement and the courts would be to link the property to the illegal activity of the subject of the search warrant. In the event no criminal filing occurs or is delayed, notice of the procedure for return of property is more critical because of the uncertainty of its status. The criminal court has the power to order the property destroyed or confiscated in the criminal case either after trial or through a plea and sentence bargain. The defendant, in a plea bargain, also has an interest in releasing the property to the government as part of a deal. The risk to Respondents, as evidenced in the record, is no less, given that the Petitioner was seeking to seize firearms and other items related to gang activity. Moreover, without input at the court from Respondents, the money could easily be used as evidence against Marsh or by Marsh, therefore, interfering with Respondents' interest in it.

The increased value of additional procedural safeguards (further notice) in avoiding the risk of loss is substantial in the record. Including in the notice already provided information allowing Respondents to employ the procedural remedy allows for access to the courts for adjudicating their interest, thereby eliminating the risk of an erroneous retention or use in a criminal proceeding. As a general matter, the "value" of the additional notice is not necessarily judged by the success of retrieving the property, but by the providing of notice sufficient to

enable one to obtain a hearing; here, however, Respondents' rights to the property is unquestioned. Further, the additional safeguards are judged as to their reasonableness, which "must be tested with reference to the existence of 'feasible and customary' alternatives to the form of notice chosen." *Green v. Lindsey*, 456 U.S. 444, 454 (1982). Here "feasible and customary" alternatives were available.

(i) Petitioner could leave a copy of the warrant. It is customary among the majority of states and the federal government, pursuant to statutory mandates, to leave a copy of the warrant at the residence searched. United States brief, fn. 1. California's customary practice is inconsistent with the Federal Rules of Criminal Procedure and the bulk of the other 49 states. Providing a copy of the document has been determined to be not only feasible, but also mandatory in these jurisdictions.

(ii) To the extent that Petitioner claims that the search warrant was "sealed" and, therefore, not feasible to leave at the home, there exist additional alternatives. The search warrant can be redacted of information which Petitioner believes may compromise the investigation. The search warrant number and other necessary information can be included on the "Search Warrant: Notice of Service" document.

(iii) Petitioner can notify the court of the officers' belief of the erroneous nature of the retention, so that a hearing would be set up or an order signed returning the property. This would avoid the danger of divulging important information.

(iv) Notice of the procedure or reference to the appropriate Penal Code sections and local rules along with the necessary information would have provided Respondents with a starting point from which to make application to the court. This would have avoided further burden to the Petitioner, by relieving it of providing piecemeal information to Respondents in each returned call.

3. The Burden Imposed on the Government.

Since Petitioner already leaves a document at the location, and, since most every other state in the Union requires the leaving of a copy of the search warrant, the requirement that Petitioner leave notice imparting key information to employ the procedure for the return of the property is clearly minimal. Petitioner need only adopt the procedure employed by the federal government – providing a copy of the warrant. Alternatively, Petitioner would not be required to create any new procedures, only the modifications of existing forms.

The information provided by Petitioner in the notice or search warrant would not burden the government with the necessity of providing legal advice. The form would only need the warrant number, the case number, or the means to identify this information or the warrant, if it is not available or sealed. Giving notice that the Respondent needed to file a written request with the court is not legal advice. No legal judgments need be made in the giving of notice. This Court has demanded in other cases that municipalities provide more notice than that which the Court of Appeals demanded here. Applying these notice

requirements to a postdeprivation context does not transform it into legal advice. The attempts by Petitioner and *Amici* to paint a confusing and burdensome picture of the Petitioner's obligation to provide notice is an overstatement without support in the record. The fundamental due process requirement of notice, as defined by the Ninth Circuit is that Respondents must be given key information and basic directions as to what course to take to retrieve their admittedly wrongfully held property. This basic, fundamental, and rudimentary information allows the aggrieved party to initiate the procedure for the return of property. To assert that this information, somehow, constitutes legal advice to the recipient of the notice illogically expands the parameters of the practice of law. The alleged fear of prosecution for the unauthorized practice of law only magnifies the absurdity of this position.

The suggestion that the notice would be overly burdensome and would "vary from time to time and court to court" and require monitoring of court procedures is unfounded. There is nothing in the record to suggest that there is any variation in the law in California much less among the nation. In fact, the record is to the contrary. California's procedure is governed by state law, not by any local ordinances; uniformity of notice, therefore, would be preserved. Additionally, according to the United States, there exists a tradition, history, and practice among the fifty states and the federal government which is evidence of a constitutional practice. Notice which imparts the basic information necessary to access the property return procedure, therefore, would not vary from court to court. Moreover, the indication is that Rule

41, at least, has not changed since 1917, thereby eliminating the possibility that the procedure would vary from time to time. United States brief at 14. Finally, the substance of the notice is basic enough that there would exist no realistic variations. In fact, only the Petitioner would have to change its notice requirements, by falling into line with the rest of the nation and provide a copy of the warrant, depending on the Court's holding in this case.[9] The substance of the notice is also not so specific as to require the minute detail fancifully envisioned in the briefs, whereby the municipality would have to give notice of everything from the grade of paper to the font-size of the type.

Moreover, this requirement does not expose the municipality to untold liability as *amici* asserts. *Amici* have presented no evidence that such a prediction will occur under the facts which are the basis of the Perkins' claim. This prediction is extremely unlikely. This court has found in other circumstances that due process mandates notice more detailed than the Court of Appeals dictated in this case. There is no proffer of evidence indicating such an overwhelming burden occurring in similar such cases.

---

[9] Respondents believe the cases strongly support that due process requires the Petitioner provide information on how to initiate the return procedure. Nevertheless, Respondents are mindful of the Court's desire for restraint. See, Section V, supra.

4. Balancing the *Mathews* Factors.

In weighing these factors, the record shows that the private property interest, personal items taken from a residence, and money saved by the family, is not an insignificant interest. The fact that the money was saved for a family trip to visit Mrs. Perkins' mother in Alabama, gives the interest much more significance.

The burden imposed on Petitioner is quite minimal, since it requires only the modification of an existing notice already left at the location. Petitioner also can leave a copy of the search warrant which also would have provided the information needed by Respondents in accessing the procedure. The only burden to which Petitioner can point is the addition of information in the notice form. This is not a significant burden at all, since the Petitioner provides notice already.

Initially, at a minimum, the search warrant could be provided or the notice should be amended to provide the essential information necessary to invoke the procedure for return of property. This involves the minimal burden of complying with the dictates set forth by the federal government and most other states by requiring that the search warrant be left at the location. Otherwise, Petitioner need only modify the notice to include the search warrant number, the case name or number, or other means of identifying the court file. The notice could easily state that the document can be submitted to the clerk of the court for identification of the court file. This is a minimal burden justified by the value to individuals

in accessing the procedure for a meaningful hearing and to avoid the risk of erroneous deprivation.

The additional text in the "Search Warrant: Notice of Service," would include information to the recipient of the procedure for contesting the seizure, *i.e.*, that the aggrieved party must seek a court order, and provide "any additional information required for initiating that procedure in the appropriate court." Since there exists no indicated variation in the laws, Petitioner need only advise of the need to file a written notice to request the property be returned promptly. Further, there is no indication that these laws have changed at all, such that the municipality would be required to monitor court procedures. This is a mandate which is rationally related to the municipality's obligation to notify an individual of the seizure itself. The burden of adding information about the procedure for obtaining return of the admittedly erroneously retained property is minimal given the uniformity and consistency of the laws over time and place.

The basic foundation and essence of due process is the providing of adequate notice to the person whose property interests are put in jeopardy. *Mathews v. Eldridge*, 424 U.S., at 348. Because they were deprived of the notice of the right to seek return of the property, *and the notice of the means by which to achieve such*, Respondents were prevented from accessing a hearing on their property.

Moreover, this Court has specifically held that "the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to

redress grievances." *Logan v. Zimmerman Brush Co.*, 455 U.S., at 429. *Logan* reaffirmed a long line of cases upholding the fundamental nature of this right. In *Boddie v. Connecticut*, 401 U.S. 371 (1971), "the Court established that, at least where interests of basic importance are involved, 'absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.' " *Logan*, 455 U.S., at 430, fn. 5, citing *Boddie*, 401 U.S., at 377. "[H]aving made access to the courts an entitlement or a necessity, the State may not deprive someone of that access unless the balance of state and private interests favors the government scheme." *Id.* As Justice Blackmun noted, "[t]he Court's cases involving the right of access to court's provides an analogous method of analysis. . . . " *Id.*

Additionally, in *Memphis Light, Gas, & Water Div. v. Craft*, 436 U.S. 1 (1978), this Court dealt with a similar set of circumstances with regard to evaluating the substance of particular notice. While this is a predeprivation case, the Court found that the notice to the customers was insufficient to satisfy Due Process, because it deprived them of a meaningful opportunity for a hearing. As the Court of Appeals quoted,

> [T]he notification procedure, while adequate to apprise the [plaintiffs] of the threat of termination of service, was not "reasonably calculated" to inform them of the availability of "an opportunity to present their objections" to their bills. *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950). The purpose of notice under the Due Process Clause is to apprise the effected individual of, and permit adequate preparation for, an impending "hearing." Notice in a case of this kind does not comport with constitutional requirements when it does not advise the customer of the availability of a procedure for protesting a proposed termination of utility service as unjustified. As no such notice was given respondents – despite "good faith efforts" on their part – they were deprived of the notice which was their due.

Memphis Lights, 435 U.S., at 14-15 (footnotes omitted). The Court can set aside the predeprivation aspect of *Memphis Light*, and utilize its thoughtful analysis of notice. The attempts by Petitioner to distinguish *Memphis Light* from this case ignore this court's willingness to utilize the balancing test to determine the dictates of due process.

Additionally, the Petitioners and *Amici* seem to ignore the fact that there was an impending hearing within the meaning of *Mathews*. Specifically, the prosecuting agency charged Marcus Marsh in a criminal proceeding. While in most cases, the criminal action will occur sooner, such an action, at any time, threatens the status of the seized property. This impending hearing necessitates notice to the party whose property could potentially be affected. Also, the *retention* of the property, as opposed to its initial *seizure*, was no longer the subject of an emergency and it was not impracticable for the government to provide notice of a hearing. Even under the Petitioner's limited construction of *Mathews*, the balancing test applies. Since there is no emergency or impracticability, there is no impediment to providing a hearing on the retention. Nevertheless, Respondents do not advocate that *Mathews* requires a hearing, since the state has an

adequate procedure. The *Mathews* balancing factors do, however, dictate that the Petitioner provide notice.

Even without an impending hearing, there appears no logical impediment to bifurcating the Court's discussion in *Memphis Light* as to the adequacy of notice. In the predeprivation hearing cases, notice is critical to guaranteeing the right of an opportunity for a meaningful hearing. Notice, in this case, is also necessary to provide an opportunity for a meaningful hearing. If notice is required in both contexts, the analysis of *Memphis Light* is controlling when judging the adequacy of the notice.

III. NEITHER CALIFORNIA STATUTES NOR CASE LAW PROVIDE SUFFICIENT NOTICE OF THE INFORMATION NECESSARY TO ACCESS THE POSTDEPRIVATION PROCEDURE.

1. Respondents were unable to get their property back because they were not provided with the search warrant number, case name, or case number or how to obtain it. This basic information was needed to access their state remedy under California law. Since the California statutes and case law could never provide the specific factual information needed by Respondents, the statutory notice cases of *North Laramie Land Co. v. Hoffman*, 268 U.S. 276 (1925), *Reetz v. Michigan*, 118 U.S. 505 (1903), and *Anderson National Bank v. Luckett*, 321 U.S. 233 (1944), do not apply.[10]

---

[10] "[A]n unfair and irrational exercise of state power cannot be transformed into a rational exercise merely by invoking [the] legal maxim or prescription . . . that each citizen may be charged with knowledge of the law." *Texaco v. Short*, 454 U.S., at 544, 102 S.Ct., at 800 (Brennan, J., dissenting).

Each of the parties in these three cases possessed the basic information to employ the procedures under state law. North Laramie Land Company knew the parcel number of their lot; Reetz had a state license number; and the *Luckett* depositors knew their account numbers. Respondents did not have comparable information; they were not provided the search warrant number, case name, or case number needed to advise the clerk's office or the court. Even if Respondents had been given a hearing, they would have needed this information to identify the property.

2. With regard to the notice of procedures, while California law may provide for an adequate procedure, in this context, statutory notice is simply nonexistent.[11] The cases relied upon to support the contention that the statute provides adequate notice are distinguishable. In *North Laramie Land Co.*, the Court held that "[a] landowner who had notice of the initiation of the proceedings for the opening of the road published in accordance with the statute, which notice as we have seen under the decisions of this court is constitutionally sufficient, would have

---

[11] The statute relied upon by Petitioner and Amici does *not* provide instructions regarding any procedure for obtaining a hearing on property. *California Penal Code section* 1536 provides only a jurisdictional basis for the return of property. The statute, unlike those in *North Laramie Land Co.*, *Reetz*, and *Luckett*, gives no notice as to what postdeprivation procedure may be invoked by a property owner. The procedure is set out in case law, and is referred to as a "nonstatutory" motion for return of property. See *People v. Icenogle*, 164 Cal.App.3d, 620, 623, 210 Cal.Rptr. 575 (1985).

experienced no practical difficulty in ascertaining when the board of county commissioners took final action and by filing notice of appeal to the district court within thirty days thereafter, he could have secured the full hearing to which he is constitutionally entitled. Having failed to adopt such procedure, the plaintiff cannot complain of a denial of due process of law." *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 287 (1925). Notice of a hearing, consequently, was already provided and the land company was put on notice that the hearing was to take place; the land company waived its right to complain by not making any effort to take advantage of a procedure already in effect. Furthermore, the Court held that the principle that property owners are charged with knowledge of the laws affecting their property has "special force" only in tax and condemnation cases. *Id.* at 283.

In *Reetz v. Michigan*, 118 U.S. 505, 509 (1903), the Court imputed knowledge of a statute to a doctor, regarding how to appeal the denial of his license to practice medicine, when he had already utilized the statute in filing his initial application. The Court held that "[t]he statute was sufficient notice," and upheld his conviction for practicing medicine without a license. Again, and similar to *North Laramie*, the Court imputed knowledge of a statute to a person whose property was such that the court would expect him to understand that "[s]uch statutes are universally in force and are general in their application, facts of which the land owner [or professional licensee] must take into account in providing for the management of his property [or professional license] and safeguarding his interest in it." *North Laramie*, 268 U.S., at 283.

Such statutory provisions are part and parcel of owning property such as land or a professional license since the ownership necessarily and obviously includes rights, limitations, duties, and other obligations. To the contrary, the owner of personal property would not be expected to have any knowledge of the laws regarding return of property seized pursuant to a search warrant. See also, *Anderson National Bank v. Luckett*, 321 U.S. 233, 237 (1944) (Bank depositor or investor deemed to know that myriad laws and regulations govern use, control, and abandonment of such property).

Thus, in each of these cases, the claimants failed to take advantage of procedures available to them under state law regarding property interests which anyone would expect them to understand existed. Laramie Land Co. bought and held real property; it should understand the general outline of eminent domain procedures. Reetz went to medical school and knew he was required to obtain and maintain a license to practice medicine, his chosen profession. The *Luckett* depositors, who invested their money in banks, should understand that abandonment of their investments may have adverse consequences.

In contrast, the Perkins family possessed personal property in their home, and had no reason to expect that there existed a set of government regulations regarding how to retrieve their property, much less that the government would somehow become involved in its seizure, such that they would be expected to have a generalized knowledge of the non-statutory procedures governing return of seized property.

Moreover, unlike the Perkins family, the claimants in these cases had the necessary procedural information with which to seek action, yet failed to utilize that information. In *North Laramie*, the land company neglected to exercise all of its rights under the statute; in fact, the land company knew that the proceedings were occurring, even obtaining an extension from the board for filing its claim, but failed to act. In *Reetz*, the claimant knew all about the licensing procedures, having been licensed previously and having applied for a renewed license only to be denied. He failed to act on his appeal. In *Anderson*, the claimants abandoned their property altogether. In this case, Respondents did not neglect to exercise their rights, did not fail to act, and did not abandon their property. Respondents did what they were supposed to do but were denied entry to the court, because they were not provided the information needed to employ the procedure for the return of their property.

Finally, Petitioner was put on notice that the property it had seized was not related to any criminal activity. Had the municipality in *North Laramie* recognized that it had wrongfully condemned the land, it would have taken action to undo it. Had the State of Michigan recognized that it had wrongfully denied Reetz his license, it would have taken action to issue him one, *sua sponte*. Had the government realized it had wrongfully forfeited a purportedly abandoned bank account, it would have restored the funds. The idea that the government can come into someone's home, take private property, admit that the property is not related to any crime, and then require the citizen to wade through the mire of non-statutory procedures for return of property without basic information

provided in the notice is repugnant to the Due Process Clause and the Fourth Amendment.

While the Due Process Clause may not require affirmative action on the part of Petitioner, the egregiousness of the retention, and the complications encountered by Respondents in pursuing their remedies magnifies the need for notice *in this case, without reaching out to establish some broad rule of application.*[12]

IV. THE NOTICE SUPPLIED BY PETITIONER BREAKS SHARPLY FROM THE TRADITIONAL FORM OF NOTICE SUPPLIED BY LAW ENFORCEMENT AGENCIES THROUGHOUT THE COUNTRY

The United States argues the fact that all the other states and the federal government provide certain notice is important evidence that due process has been satisfied. By the same token "[e]ach of our cases has recognized, either explicitly or implicitly, that because minimum procedural requirements are a matter of federal law, they are not diminished by the fact that the State may have specified its own procedure that it may deem adequate for determining the preconditions to adverse official action." *Logan v. Zimmerman Brush Co.*, 455 U.S., at 432, citing *Vitek v. Jones*, 445 U.S. 480, 491 (1980) (internal quotes and brackets omitted). There are compelling reasons why this

---

[12] Respondent recognizes that some inconvenience to the citizen is acceptable given the interests of law enforcement. However, the circumstances here reveal that Respondents were stymied in their efforts, not just inconvenienced.

evidence is unpersuasive in support of Petitioner's position.

Petitioner gave notice which would *not* have complied with Fed.R.Crim.P. 41(d) or any other similar state statute. Rule 41 requires that the agency "taking property under the warrant shall give to the person from whom or from whose premises the property was taken *a copy of the warrant and* a receipt for the property taken or shall leave the *copy* and receipt at the place from which the property was taken." Fed.R.Crim.P. 41(d).[13] Petitioner did leave a receipt for the property but *not* a copy of the warrant. Had Respondents received a copy of the warrant, Respondents would have had information that would have allowed them to appear at the courthouse and to provide the court clerk with the key information to allow the case to be put on a judge's calendar for resolution. The copy of the warrant has the warrant number listed. J.A. 92. Petitioner's practice is not consistent with the history and practice in the other states and the federal government.

This evidence is, at best, weak because of its dissimilarity to Petitioner's practice, at worst, wholly irrelevant to the point sought to be proved. Conversely, the history and practice of other states and the federal government is evidence of the *unconstitutionality* of Petitioner's notice, since the other statutory schemes are evidence of what does comply with due process.

---

[13] The Court will recognize that the majority of the state statues are modeled after the Federal Rule of Criminal Procedure 41.

V. IN THE ALTERNATIVE, SHOULD THE COURT DETERMINE THAT THE NOTICE REQUIREMENTS OF THE COURT OF APPEALS WENT TOO FAR, THE FINDING THAT THE NOTICE WAS INADEQUATE IS PRINCIPLED AND JUSTIFIES THE AFFIRMATION OF THE OPINION WITH MODIFICATIONS TO THE NOTICE REQUIREMENTS

Due process requires "an opportunity . . . [for a hearing] granted at a meaningful time and in a meaningful manner," *Logan v. Zimmerman Brush Co.*, 455 U.S., at 437, "is flexible and calls for such procedural protections as the situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1961). If the Court's balancing of the competing governmental and private interests differs in substance from that of Respondents and the Court believes that due process does not require any notice of the procedures, the Court should affirm the holding of the Court of Appeals as its central holding is fundamentally correct – that "the notice given Perkins did not meet the requirements of due process." Pet.App. A23. At a minimum, due process requires that the notice provide "information required for initiating that procedure in the appropriate court. In circumstances such as those presented by this record, the notice must include the search warrant number, or, if that is not available or the record is sealed, the means of identifying the court file." Pet.App. A22.

The holding of the case, that notice was insufficient, is a principled ruling and finds ample support in the record and case law, as described above. Nevertheless, should the Court determine that notice of the procedures is not required to satisfy due process, this court can and

should, in the alternative, still find that the notice was lacking but limit the procedural notice requirements. The flexibility of due process and the requirement of "meaningfulness" demands affirmation.

CONCLUSION

For the reasons stated herein, Respondents pray that the decision of the Court of Appeals be affirmed in its entirety, or in the alternative, affirmed, but modified, and that they be awarded costs.

DATED: September 11, 1998

Respectfully submitted,

PATRICK S. SMITH,
Counsel of Record
KLASS, HELMAN & ROSS
11766 Wilshire Boulevard, Suite 200
Los Angeles, California 90025-6538
(310) 277-2224; Fax (310) 470-1080
Attorneys for Respondents

Supreme Court, U.S.
FILED
OCT 14 1998
OFFICE OF THE CLERK

No. 97-1230

In The

SUPREME COURT OF THE UNITED STATES
October Term, 1998

CITY OF WEST COVINA,
Petitioner,

vs.

LAWRENCE PERKINS; CLARA PERKINS;
APRIL PERKINS, a minor, by and through
LAWRENCE PERKINS,
Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY TO RESPONDENTS' BRIEF ON THE MERITS

DAVID D. LAWRENCE*
CINDY S. LEE
FRANSCELL, STRICKLAND,
ROBERTS & LAWRENCE
A Professional Corporation
225 South Lake Avenue
Penthouse
Pasadena, California 91101-3005
(626) 304-7830
Attorneys for Petitioner

*Counsel of Record**

TABLE OF CONTENTS

Page

INTRODUCTION 2

ARGUMENT 4

I. RESPONDENTS' RELIANCE ON FEDERAL RULE OF CRIMINAL PROCEDURE 41(d) AND TWO CONDEMNATION CASES FOR THE PROPOSI-TION THAT DUE PROCESS REQUIRES "NOTICE" IN A POST-DEPRIVATION CASE IS MISPLACED 4

A. Rule 41(d) Arises From The Fourth Amendment, Not The Due Process Clause 4

B. Contrary To Respondents' Assertion, *Bragg v Weaver* And *Schroeder v. City Of New York* Are Not True Postdeprivation Cases And Have Little Application To The Instant Case 8

II. IF THIS COURT DETERMINES THAT SOME FORM OF "NOTICE" IS REQUIRED IN POST-DEPRIVATION CASES UNDER THE DUE PROCESS CLAUSE, THE "NOTICE" REQUIRE-MENT IS SATISFIED WHEN LAW ENFORCE-MENT OFFICERS GIVE INDIVIDUALIZED NOTICE THAT PROPERTY HAS BEEN SEIZED . 12

A. Respondents' Argument That They Would Have Been Able To Invoke The Process If They Had Been Given The Search Warrant Number Is Factually Unsupported And Legally Flawed 12

B. Contrary To Respondents' Speculation, Providing Accurate And Complete Information Regarding Potential Legal Remedies Is By No Means Simple 15

CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES

Albright v. Oliver,
510 U.S. 266 (1994) 3, 7

Anderson Nat'l Bank v. Luckett,
321 U.S. 233 (1944) 17

Berger v. State of New York,
388 U.S. 41 (1967) 5, 6

Bragg v. Weaver,
251 U.S. 57 (1919) 3, 8, 9, 10, 11, 12

Graham v. Connor,
490 U.S. 386 (1989) 3, 7

Hudson v. Palmer,
468 U.S. 517 (1984) 3, 13

Matthews v. Eldridge,
424 U.S. 319 (1976) 7

Mullane v. Central Hanover Bank & Trust Co.,
339 U.S. 306 (1950) 11

North Laramie Land Co. v. Hoffman,
268 U.S. 276 (1925) 17

Parratt v. Taylor,
451 U.S. 527 (1981) 3, 13

People v. Von Villas,
10 Cal.App.4th 201 (1992) 16

TABLE OF AUTHORITIES - Continued

Page

Reetz v. Michigan,
188 U.S. 505 (1903) 17

Schroeder v. City of New York,
371 U.S. 208 (1962) 3, 8, 9, 10, 11, 12

Stern v. Superior Court,
76 Cal.App.2d 772 (1946) 14, 16

United States v. Freitas,
800 F.2d 1451 (9th Cir. 1986) 6

Wenzler v. Municipal Court,
235 Cal.App.2d 128 (1965)..... 14

UNITED STATES CONSTITUTION

Fourth Amendment.....passim
Fourteenth Amendment.....11, 18

STATUTES AND RULES

42 U.S.C. Section 1983 ..... 8, 14

Cal. Code of Civ. Proc.
§ 1084 14
§ 1085 14

Cal. Penal Code
§ 1417 16
§ 1536 .....14, 15, 16
§ 1538.5 15
§1539 15
§1540 .....15, 16

Fed. Rule of Crim. Proc. 41(d) 2, 4, 5, 6, 18

INTRODUCTION

The crux of respondents' argument is the assertion that the City deprived them of the "information necessary to implement the procedure for return of property, and therefore, rendered the process meaningless." (Resp. Brief at 9.) Specifically, respondents contend that but for the City's failure "to leave a copy of the search warrant (which includes the identifying search warrant number)," it is "likely that respondents would have been able to retrieve their property under the appropriate procedures." (Resp. Brief at 1, 11, 32, 38.) Respondents' argument lacks both factual and legal support.

Factually, respondents rely exclusively on their claim that they *did not* get the property back as evidence that they *could not* get the property back. However, the record is devoid of any evidence to support respondents' contention that a search warrant number was required to invoke the process. Rather, the evidence demonstrates that at most, Mr. Perkins "made one trip to the Municipal Court, was advised that there was no file in his name and ceased any efforts to obtain an order returning his property." (Pet.App. E7.)

Legally, respondents rely on Federal Rule of Criminal Procedure 41(d) and two condemnation cases for the proposition that the Due Process Clause imposes a duty to provide "notice" of some sort even where notice and a hearing prior to the deprivation are not required. Rule 41(d), however, is grounded in the Fourth Amendment, not the Due Process Clause. While notice of the search, the authority for the search and the identity of any items seized seem reasonable under the Fourth Amendment, a separate notice under the Due Process Clause is unnecessary and unsupported by precedent.

Equally unpersuasive is respondents' reliance on two condemnation cases, *Bragg v. Weaver*, 251 U.S. 57 (1919) and *Schroeder v. City of New York*, 371 U.S. 208 (1962) as purported examples of postdeprivation cases which require notice. Both cases arose in the condemnation context where the notices at issue were of an impending hearing or deadline which would work forfeitures of the claimants' rights in the absence of some affirmative action by the claimants. Therefore, notice was required in *Bragg* and *Schroeder*, not to inform the claimants of the existence of a postdeprivation "remedy", but to provide them with the opportunity to appear and be heard at a proceeding where the amount of compensation would be finally adjudicated. Consequently, *Bragg* and *Schroeder* have little application to the instant case.

Without citing to any legal authority, respondents complain that simply notifying them that property was seized from their residence pursuant to a court-issued warrant was insufficient for purposes of the Due Process Clause. In urging this Court to ignore its prior holdings, respondents contend that due process is not satisfied in postdeprivation cases even where the State provides adequate post-deprivation remedies for the return of seized property. *See Parratt v. Taylor*, 451 U.S. 527, 544 (1981) and *Hudson v. Palmer*, 468 U.S. 517 (1984). According to respondents, due process also requires the State to provide adequate notice to potential claimants of their legal remedies and the procedures for invoking them (i.e., "key information" and "basic directions" as to what course to take to retrieve their property.) (Resp. Brief at 26.) This is the type of constitutionalization of state law by the creation of additional "due process" rights that this Court has warned against. (*See, Graham v. Connor*, 490 U.S. 386, 394-395 (1989) and *Albright v. Oliver*, 510 U.S. 266, 273-74 (1994).)

Finally, if this Court determines that the Due Process Clause requires some form of notice even in postdeprivation cases such as the instant action, the notice requirement should be limited to notice of the actual seizure of property pursuant to a court issued warrant.

Simply stated, where a public agency is not required to provide a hearing prior to the seizure of a property interest, procedural due process is satisfied as long as the State provides adequate postdeprivation judicial remedies to the claimant. The adequacy of the state remedy does not turn on whether the State provides notice of the availability of a judicial remedy and guidance for invoking that remedy.

ARGUMENT

I. RESPONDENTS' RELIANCE ON FEDERAL RULE OF CRIMINAL PROCEDURE 41(d) AND TWO CONDEMNATION CASES FOR THE PROPOSITION THAT DUE PROCESS REQUIRES "NOTICE" IN A POST-DEPRIVATION CASE IS MISPLACED

A. Rule 41(d) Arises From The Fourth Amendment, Not The Due Process Clause

Without any citation to legal precedent, respondents assert that "[n]otice is a fundamental component of due process regardless of when the hearing occurs." (Resp. Brief at. 12.) Instead of citing precedent, respondents simply state that "[t]he United States agrees." (Id.) The amicus brief filed on behalf of the United States assumes that due process imposes a requirement of "individualized notice that property has been seized." The cited authority is Federal Rule of Criminal Procedure 41(d) and the history and practice of a majority of the States. Nothing in the history of Rule 41(d), however, suggests that it has

its roots in due process law. Rather, the history of Rule 41(d) makes clear that it is a creature of the Fourth Amendment.

The City agrees that under the circumstances of the instant case, it has a duty of providing "individualized notice that a law enforcement agency has seized identified property pursuant to a court-issued warrant." That duty, however, flows from the Fourth Amendment's proscription against unreasonable searches and seizures, not a notice component of procedural due process.[1]

There are few who could argue with the proposition that failing to leave any notification for an absent homeowner of a recently executed search could render an otherwise valid search unreasonable. Absent some notification as to who had entered the home and under what authority, the absent homeowner would be left to speculate that his home had been unlawfully entered and that his personal effects had been stolen. Indeed, in *Berger v. State of New York*, 388 U.S. 41, 60 (1967), this Court stated that the absence of any notice requirement in a New York statute authorizing warrants for wiretaps was one of the factors invalidating the statute under the Fourth Amendment.[2]

---

[1] The Fourth Amendment to the Constitution of the United States of America provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[2] Decisions of various circuit courts interpreting Rule 41 also demonstrate that it is grounded in the Fourth Amendment, not in the Due Process Clause of the Fourteenth Amendment. *See United States v. Pangburn*, 983 F.2d 449 (2nd Cir. 1993) (Rule 41 notice requirements analyzed in context of Fourth Amendment search and seizure principles); *United States v. Gervato*, 474 F.2d 40, 43-44 (3rd Cir. 1973) (Rule 41(d) analyzed in context of Fourth Amendment in determining whether warrant can be constitutionally executed in the known absence of the occupant where there are no exigent circumstances); *Navarro v. United States*, 400 F.2d 315, 318 (5th Cir. 1968) ("The purpose of Rule 41 is to carry out the mandate of the fourth amendment."); *United States v. Searp*, 586 F.2d 1117, 1121 (6th Cir. 1978) (recognizing that "the purpose of Rule 41 is the implementation of the fourth amendment..."); *United States v. Hepperle*, 810 F.2d 836, 838 (8th Cir. 1987) (noting that the "fourth amendment protects the right of the person to be free from unreasonable searches" and Rule 41 "outlines procedural requirements relating to search warrants").

The Ninth Circuit has recognized that Rule 41(d) is grounded in the Fourth Amendment. Specifically, in *United States v. Freitas*, 800 F.2d 1451 (9th Cir. 1986), the Ninth Circuit addressed whether a warrant which authorized the surreptitious entry into a home to obtain information regarding drug manufacturing violated the Fourth Amendment by failing to provide notice as required under Rule 41(d). Finding that the absence of notice violated the Fourth Amendment, the Ninth Circuit stated:

> The absence of a notice requirement in the warrant presents a much more difficult issue. While it is clear that the Fourth Amendment does not prohibit all surreptitious entries, *see Dalia v. United States*, 441 U.S. 238, 247, 99 S.Ct. 1682,1688, 60 L, Ed.2d 177 (1979), it is also clear that the absence of any notice requirement in the warrant casts strong doubt on its constitutional adequacy, *see Berger v. New York*, 388 U.S. 41, 60, 87 S.Ct. 1873, 1884, 18 L.Ed.2d 1040 (1967). We resolve those doubts by holding that in this case the warrant was constitutionally defective in failing to provide

explicitly for notice within a reasonable, but short, time subsequent to the surreptitious entry. Such time should not exceed seven days except upon a strong showing of necessity.

We take this position because **surreptitious searches and seizures of intangibles strike at the very heart of the interests protected by the Fourth Amendment.** The mere thought of strangers walking through and visually examining the center of our privacy interest, our home, arouses our passion for freedom as does nothing else. That passion, the true source of the Fourth Amendment, demands that surreptitious entries be closely circumscribed. The warrant in this case failed to do so.

Id. at 1456 (emphasis added).

In short, the authorities cited by respondents suggest, at most, that any notice requirement arises from the Fourth Amendment, not the Due Process Clause. See also *Graham v. Connor, supra*, 490 U.S. at 394 (if a constitutional claim is covered by a specific constitutional provision, the claim must be analyzed under the standard appropriate to that specific provision, not under substantive due process); *see also Albright v. Oliver, supra*, 510 U.S. 266 (substantive due process analysis is inappropriate if a plaintiff's claim is "covered by" the Fourth Amendment). The City suggests, therefore, that any required notice in the instant case be judged under the Fourth Amendment's reasonableness standard, not under the balancing test of *Matthews v. Eldridge*, 424 U.S. 319 (1976). Here, it is undisputed that the City's officers in this case left a form entitled "Search Warrant: Notice of Service" and receipt for property seized pursuant to the warrant. The notice identified the agency that performed the search, the date of the search and the identity of the

judicial officer who issued the warrant. Therefore, the City did what it was required to do for Section 1983 purposes – it notified the individuals whose residence was searched that government officials have seized identified property under the authority of a court-issued warrant.

B. Contrary To Respondents' Assertion, *Bragg v. Weaver* And *Schroeder v. City Of New York* Are Not True Postdeprivation Cases And Have Little Application To The Instant Case

Respondents cite only two cases for the proposition that notice of some sort has been previously recognized as a necessary element of due process where the State was not required to provide a hearing prior to the deprivation of a property interest. *Bragg v. Weaver*, *supra*, 251 U.S. 57; *Schroeder v. City of New York*, *supra*, 371 U.S. 108. Both of those cases, not coincidentally, arise in the condemnation context which is *sui generis*, i.e. since the "taking" itself is a legislative function, it is not subject to challenge.[3] Under the Fifth Amendment, the state has the unquestioned power to take "private property ...for public use." There is no postdeprivation "remedy," in the traditional sense, i.e., the claimant is not required to prove his right to compensation. Rather, the issue is simply how much compensation the State is obliged to pay. On that issue, the claimant is entitled to notice and an opportunity to be heard prior to a final determination.

> But it is essential to due process that the mode of determining the compensation be such as to afford the owner an opportunity to be heard.

---

[3] See *Bragg*, 251 U.S. at 58. The taking of private property for the public use is a legislative question "and a hearing thereon is not essential to due process in the sense of the Fourteenth Amendment."

> Among several admissible modes is that of causing the amount to be assessed by viewers, subject to an appeal to a court carrying with it a right to have the matter determined upon a full trial. [Citations omitted] And where this mode is adopted due process does not require that a hearing before the viewers be afforded, but is satisfied by the full hearing that may be obtained by exercising the right to appeal. [Citations omitted.]
>
> . . .
>
> An opportunity to have such a hearing, before the compensation is finally determined, and when the right thereto can be effectively asserted and protected, satisfies the demand of due process.

Bragg, 251 U.S. at 59, 60-61.

In both *Bragg* and *Schroeder*, the notice required by due process was of the commencement of a finite period within which the claimants were required to assert their rights. Failure to assert those rights within the time periods resulted in the automatic loss of the rights. In *Bragg*, the right was to obtain a final determination of compensation by the circuit court. [4] In *Schroeder*, the

[4] In *Bragg*, the statute provided for notice of the supervisors' non-final decision regarding compensation either by the claimant's presence when the decision was made or by written notification from the clerk. A statute of general application provided a 30 day period for appealing decisions of the supervisors to the circuit court, a court of general jurisdiction, for review de novo. Personal notice of the supervisors' decision which started the clock running on the 30 day statute of limitations was held sufficient to satisfy due process. The entity was not required to also provide notice of the 30 day statute of limitations nor of the procedures necessary to invoke the right of appeal.

right was to make a claim which would result in a final determination of compensation by the city.[5] The requirement of notice in *Bragg* and *Schroeder* preceded any final adjudication and is consistent with this Court's other holdings imposing a notice requirement for proceedings which are to be accorded finality.

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

[5] The *Schroeder* case involved a city's condemnation procedures relative to its diversion of a portion of the Neversink River. The statute found violative of due process in *Schroeder* did not require personal notice. Instead, it required publication and the posting of notices in conspicuous places in the vicinity of the real estate to be taken. Unlike *Bragg*, the statute in *Schroeder* required the land owner to file a claim with the city and all claims were barred if not filed within three years of notice. The statute did not provide for a preliminary determination by the city regarding the amount of compensation. The determination which flowed from the original claim was final.

The claimant in *Schroeder* was never provided personal notice and the consequences of the diversion of the rive were not such that it would be apparent that the city had diverted the river. The property owner failed to make a claim within three years of the constructive notice and her claim for compensation was barred by the statute of limitations. In finding that the statute in question violated due process, this Court held that the city was obligated to at least make a good faith effort to provide personal notice to the property owner, whose name and address were easily ascertainable, that the city had diverted the river and that the appellant had a right to be heard on a claim for compensation.

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). Whether a hearing for final adjudication of a right is already set or some action by the claimant is necessary to avoid the loss of a right by default, the principle is the same.

> 'The fundamental of due process of law is the opportunity to be heard.' *Grannis v. Ordean*, 234 U.S.385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.

Mullane, 339 U.S. at 314.

Bragg and *Schroeder* have little application to the instant case. Neither case involved a "taking" protected under the Fourteenth Amendment. Neither case imposes under the Due Process Clause an obligation to advise a potential claimant of the procedures necessary to invoke or protect a property right. In other words, the notice required by due process, which was found adequate in *Bragg* and inadequate in *Schroeder*, was not notice of the law pertinent to condemnation proceedings. Rather, the required notice was of the pendency of a final proceeding regarding compensation. *Bragg* and *Schroeder* simply stand for the proposition that notice is required if failure to provide it will cause the potential claimant to lose the opportunity to be heard at a final adjudication of a protected property right. As such, those cases are predeprivation in nature. In other words, because the State's power to take property for public use is subject only to the obligation under the Fifth Amendment to provide "just compensation," without unreasonable delay, the notice given in both cases actually preceded a "final" determination as to compensation.

Respondents in this case were not faced with the prospect of a final determination of their property rights in the absence of some affirmative act on their part. There was no statute of limitations which had begun to run. Nor is there anything in the record to suggest the existence of a pending hearing where respondents' property rights would be finally adjudicated. Finally, even if there had been a pending hearing or statute of limitations, respondents were provided more than the minimal notice called for in *Bragg* and *Schroeder*.

II. IF THIS COURT DETERMINES THAT SOME FORM OF "NOTICE" IS REQUIRED IN POST DEPRIVATION CASES UNDER THE DUE PROCESS CLAUSE, THE "NOTICE" REQUIREMENT IS SATISFIED WHEN LAW ENFORCEMENT OFFICERS GIVE INDIVIDUALIZED NOTICE THAT PROPERTY HAS BEEN SEIZED

A. Respondents' Argument That They Would Have Been Able To Invoke The Process If They Had Been Given The Search Warrant Number Is Factually Unsupported And Legally Flawed

Respondents offer a variety of reasons for why they were unable to invoke the remedies available to retrieve their property: they were not provided with "key information about the seizure to access the procedure" (Resp. Brief at 8); they were not provided with "basic information to identify the property" (Resp. Brief at 8); they were not provided with "notice of the identification of the procedure" (Resp. Brief at 11); Judge Oki was on vacation; the postdeprivation remedy, although it was adequate, was not "meaningful" (Resp. Brief at 9); the criminal case was not filed until February 9, 1994.[6] All of

[6] Contrary to respondents' assertion, the criminal case was

these purported reasons are factually and legally insufficient to support respondents' contention that the notice provided by the City was constitutionally inadequate.

Respondents' contention that the notice denied them "basic information" necessary to obtain return of their property contravenes this Court's prior decisions wherein it was held that a state remedy is not inadequate simply because recovery might be difficult, time-consuming, speculative, or uncertain. *See*, *Parratt v. Taylor*, *supra*, 451 U.S. at 543-44 and *Hudson v. Palmer*, *supra*, 468 U.S. at 535. Moreover, this Court has repeatedly rejected the argument that a state remedy is inadequate simply because claimants are not aware of the fact that the remedy exists. Respondents concede that in the *Parratt-Hudson* line of cases where there is no need for predeprivation notice and a hearing, due process is satisfied only if a meaningful postdeprivation remedy is available. (Resp. Brief at 9.) However, respondents err in concluding that by merely providing notice of the seizure of property itself, the City "deprived Respondents of the information necessary to implement the procedure for return of property and, therefore, rendered the process meaningless." (Resp. Brief at 9.)

In essence, respondents urge this Court to conclude from the fact that they failed to invoke the process that the process was meaningless. According to respondents, if only they were provided with a bit more information, such as a search warrant number, a court file number, and a bit of guidance on the necessity of a written motion, the respondents would have been

---

filed in the Municipal Court on July 9, 1993. The docket from the Citrus Municipal Court clearly shows that a criminal case complaint in the matter entitled *The People of the State of California v. Marcus Edward Marsh*, Case Number KAO18341, was filed on July 9, 1993. If judicial notice is taken, it should reflect the correct date.

successful in obtaining the return of their property. In urging this Court to speculate at this conclusion, however, respondents ignore the fact that the decision below also found the mandamus remedy to be adequate. (Pet. App. 17.) A petition for writ of mandamus is an original proceeding. *Wenzler v. Municipal Court*, 235 Cal.App.2d 128, 132 (1965). A writ of mandamus compels a public officer to perform a duty of the office. Cal. Code of Civ. Proc. §§ 1084, 1085.

Assuming, arguendo, that the search warrant number in the instant case was necessary to invoke California Penal Code § 1536, there is no basis for concluding that respondents could not have proceeded with a petition for writ of mandamus. Respondents were provided with a list of the property seized, the date it was taken, the police agency with custody, and the name and location of the judge whose order was necessary to obtain a release of the property. The writ would seek an order compelling Judge Oki to release the money and the gun in the custody of the West Covina Police Department. *Stern v. Superior Court*, 76 Cal.App.2d 772 (1946). No existing case number would be necessary to bring the action. Respondents had everything they needed to seek a writ of mandamus. Why, then, was the notice inadequate?

The fact is that respondents' alleged ignorance regarding the search warrant number was not an actual impediment, but rather it was an excuse. If respondents were truly motivated to invoke the process for the return of the money, and if the only thing that was preventing them from getting it back was the search warrant number and "basic information" regarding the legal procedures, as they now purport, it seems odd that they did nothing to obtain a return of the property even after they had the search warrant number and a lawyer. Respondents do not address this point in their brief. The unexplained lack of effort by respondents in obtaining a return of the property

emphasizes the folly inherent in the Ninth Circuit's method for determining the adequacy of notice. One cannot reliably judge the adequacy of notice based upon the success or lack thereof by a civil plaintiff. The fact that a Section 1983 plaintiff is allegedly unsuccessful in obtaining the release of seized property may say more about the motivation of the plaintiff than about the adequacy of the notice.

B. Contrary To Respondents' Speculation, Providing Accurate And Complete Information Regarding Potential Legal Remedies Is By No Means Simple

Respondents characterize as "slight" the additional burden placed upon law enforcement to provide notice of the applicable procedures to be employed in obtaining the return of seized property. This gross mischaracterization fails to take into account the information known to the officers at the time the property is seized (or lack thereof) and its relation to the various postdeprivation remedies. A variety of California laws set forth various procedures to be employed when one seeks the return of property seized pursuant to a search warrant. See Cal. Penal Code §§ 1536, 1538.5, 1539 and 1540. The procedures vary depending upon the nature and status of the property seized, the status of the owner of the property, and the nature and status of the criminal proceedings (if any) relating to the seized property. For instance, California Penal Code § 1538.5 sets forth a laundry list of procedures to be followed by a criminal defendant in seeking a return of seized property. It lists five separate grounds for seeking an order returning property. Cal. Penal Code § 1538.5(a)(2). The procedures differ depending on various factors including whether the charged crime is a misdemeanor or felony, whether the charges are initiated through a grand jury proceeding or preliminary hearing and whether the People appeal an order granting the motion.

The procedures applicable to non-criminal defendants are numerous as well. If the owner of the property is not charged with an offense, he may move under Cal. Penal Code § 1540 for a return of the property "[i]f it appears that the property taken is not the same as that described in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, . . ." California Penal Code § 1540. If, however, the property was lawfully seized, as in the instant case, the relevant procedure is governed by California Penal Code § 1536.[7] This does not mean, however, that the owner of the property is automatically entitled to its return since it could still be evidence of a crime necessary for a criminal proceeding. See *People v. Von Villas*, 10 Cal.App.4th 201, 239 (1992) ("Obviously the determination as to whether evidence is 'material' or not cannot be made prior to or during a search pursuant to a search warrant."). If the evidence is in fact used in a criminal proceeding, the procedures for disposing of those exhibits are set forth in California Penal Code §§ 1417, et seq. In addition, a mandamus proceeding is an entirely different remedy, with its own procedures. *Stern v. Superior Court*, 76 Cal.App.2d 772 (1946).

The foregoing is in no way intended to be a complete articulation of the various scenarios which will determine the appropriate procedures for obtaining the return of seized property. What it does demonstrate, however, is that the "appropriate procedure" depends upon a number of factors which are unknown and undeterminable at the time the property is seized. When

---

[7] Respondents repeatedly assert in their brief that their property was unlawfully or mistakenly seized. Neither assertion is accurate. The district court specifically found that there was probable cause to seize the property and that the seizure was lawful. (J.A. 57.)

the property is seized, the officer executing the warrant will have no way of knowing whether the owner of the property will be criminally prosecuted. Nor will he or she know whether the seized property will actually be used in a criminal proceeding, or whether the criminal proceeding will be a felony or misdemeanor proceeding. Assuming the owner of the property is not charged with a crime, the executing officer will have no way of knowing whether the seized property will nonetheless be used in a criminal proceeding. Nor will he or she know whether the owner of the property will claim that the warrant was not supported by probable cause or that the property was not that described in the warrant. Consequently, a notice which would encompass every possible scenario would be impossibly complex and, therefore, relatively meaningless.[8]

In short, the burden imposed by the Ninth Circuit's notice requirement is anything but slight. It is complex, unworkable and unrealistic. Furthermore, it demonstrates the wisdom of this Court's prior decisions establishing the principle that once an individual has been given notice that his property is subject to some governmental action, the published statute at issue supplies adequate notice of the procedure for challenging the deprivation of property. *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 280 (1925); *Reetz v. Michigan*, 188 U.S. 505, 509 (1903); *Anderson Nat'l Bank v. Luckett*, 321 U.S. 233, 237 (1944).

In the event that this Court determines that some form of "notice" is required under the Due Process Clause in cases where a hearing prior to the deprivation is not necessary, it should be limited to notice by law enforcement officers that property has been seized pursuant to a court-issued warrant. The information left

[8] The United States makes the same point with regard to federal warrants at pages 20 and 21 of its brief.

at the respondents' home in this case provided all the notice that was required for Fourteenth Amendment purposes. A motivated individual could have obtained an order for the return of his or her property with the information provided by the City.

Therefore, under either a Fourteenth Amendment or Fourth Amendment analysis, the notice provided by the City, which is virtually identical to the notice provided by the United States under Rule 41(d), was constitutionally adequate.

CONCLUSION

For all of the foregoing reasons, as well as the reasons set forth in the City's Brief on the Merits, the judgment of the court of appeals should be reversed.

Respectfully submitted,

DAVID D. LAWRENCE*
CINDY S. LEE
FRANSCELL, STRICKLAND,
ROBERTS & LAWRENCE
A Professional Corporation
225 South Lake Avenue
Penthouse
Pasadena, California 91101-3005
(626) 304-7830
Attorneys for Petitioner

*Counsel of Record**

OCTOBER 1998

Supreme Court, U.S.
FILED
JUL 16 1998
CLERK

No. 97-1230

In the Supreme Court of the United States

OCTOBER TERM, 1997

CITY OF WEST COVINA, PETITIONER

v.

LAWRENCE PERKINS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

SETH P. WAXMAN
Solicitor General
Counsel of Record
MICHAEL R. DREEBEN
Deputy Solicitor General
IRVING L. GORNSTEIN
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the Due Process Clause requires a law enforcement agency that seizes property pursuant to a search warrant to provide written notice to property owners of the procedure for seeking return of the property taken, along with any additional information required for initiating that procedure in the appropriate court.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	6
Argument:	
The notice component of due process is satsified when law enforcement officers inform persons that their property has been seized under warrant and publicly available laws inform persons about the procedures for seeking return of their property	9
A. California provides adequate postdeprivation procedures for the return of property, and the only question is whether property owners have adequate notice of those procedures	9
B. The traditional form of notice that law enforcement officers provide to property owners is notice that identified property has been seized	13
C. Decisions of this Court establish that the government may generally rely on the applicable law to inform property owners of their legal remedies and how to invoke them	15
D. The court of appeals' notice obligations would impose substantial new burdens on the government without providing a significant benefit to property owners	20
E. The court of appeals' reasons for imposing its notice requirments are unpersuasive	23
Conclusion	27

TABLE OF AUTHORITIES

Cases:

Anderson Nat'l Bank v. *Luckett*, 321 U.S. 233 (1944) 17

Atkins v. *Parker*, 472 U.S. 115 (1985) 18, 26

Cases—Continued: Page

Burnham v. *Superior Court of Cal.*, 495 U.S. 604 (1990) 15
Daniels v. *Williams*, 474 U.S. 327 (1986) 26
Fuentes v. *Shevin*, 407 U.S. 67 (1972) 10
Gilbert v. *Homar*, 117 S. Ct. 1807 (1997) 10
Ingraham v. *Wright*, 430 U.S. 651 (1977) 19
Mathews v. *Eldridge*, 424 U.S. 319 (1976) 5, 25
Medina v. *California*, 505 U.S. 437 (1992) 15
Memphis Light, Gas & Water Div. v. *Craft*, 436 U.S. 1 (1978) 5, 8, 23, 24, 25
Mullane v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) 9, 11, 19
North Laramie Land Co. v. *Hoffman*, 268 U.S. 276 (1925) 16, 26
Parratt v. *Taylor*, 451 U.S. 527 (1981) 10, 19, 26
Reetz v. *Michigan*, 188 U.S. 505 (1903) 16
Texaco, Inc. v. *Short*, 454 U.S. 516 (1982) 18, 19, 26
Tulsa Prof'l Collection Servs., Inc. v. *Pope*, 485 U.S. 478 (1988) 8, 23

Constitution, statutes and rules:

U.S. Const.:
Amend. IV 4, 10
Amend. XIV (Due Process Clause) . 4, 5, 6, 12, 15, 23, 26
Act of June 15, 1917, ch. 30, Tit. XI, § 12, 40 Stat. 229 14
21 U.S.C. 888(b) 23
Ala. Code § 15-5-11 (1995) 14
Alaska Stat. § 12.35.030 (Michie 1996) 14
Ariz. Rev. Stat. Ann. §§ 13-3919 to 13-3922 (West 1989) 14
Cal. Penal Code (West 1992): 14
§ 1535 14
§ 1536 ..... 11, 14
§ 1540 11
Colo. Rev. Stat. § 16-3-305 (1997) 14

Statutes and rules—Continued: Page

Conn. Gen. Stat. Ann. (West Supp. 1998):
§ 54-33c 14
§ 54-36f 14
D.C. Code Ann. § 23-524 (1996) 14
Fla. Stat. Ann. § 933.11 (West 1996) 14
Ga. Code Ann. (1997):
§ 17-5-25 14
§ 15-4-29 14
Idaho Code (1997):
§ 19-4413 14
§ 19-4415 14
§ 19-4416 14
725 Ill. Comp. Stat. Ann. (West 1992) (effective Jan. 1, 1993):
5/108-6 14
5/108-10 14
Ind. Code Ann. §§ 35-33-5-2 to 35-33-5-7 (Michie 1998) 14
Iowa Code Ann. § 808.8 (West 1994) 14
Kan. Stat. Ann.:
§ 22-2506 (1995) 14
§ 22-2512 (Supp. 1997) 14
La. Code Crim. P. Ann. art. 166 (West 1991) 14
Mass. Ann. Laws ch. 276:
§ 1 (Law. Co-op. 1992) 14
§ 2 (Law. Co-op. 1992) 14
§ 3 (Law. Co-op. Supp. 1998) 14
§ 4 (Law. Co-op. 1992) 14
Mich. Comp. Laws § 780.655 (West 1982) 14
Minn. Stat. Ann. (West Supp. 1998):
§ 626.16 14
§ 626.17 14
Miss. Code Ann. (1994):
§ 41-29-157(a)(3) 14
§ 99-27-15 14
Mo. Ann. Stat. § 542.291 (West Supp. 1998) 14

Statutes and rules—Continued: Page

Mont. Code Ann. (1997):
§ 46-5-227 14
§ 46-5-301 14
Neb. Rev. Stat. Ann. § 29-815 (Michie 1995) 14-15
Nev. Rev. Stat. Ann. § 179.075 (Michie 1997) 15
N.H. Rev. Stat. Ann. § 595.A:5 (1986) 15
N.C. Gen. Stat. (1997):
§ 15A-252 15
§ 15A-254 15
N.J. Stat. Ann. § 33:1-61 (West 1994) 15
Ohio Rev. Code Ann. § 2922.24.1 (Anderson 1996) ... 15
Okla. Stat. Ann. tit. 22, §§ 1229 to 1234 (West 1986) . 15
Or. Rev. Stat. (1995):
§ 133.575 15
§ 133.595 15
S.C. Code Ann. § 17-13-150 (Law. Co-op. 1985) 15
Tex. Crim. P. Code Ann. § 18.06 (West 1977 & Supp. 1998) 15
Utah Code Ann. § 77-23-206 (1995) 15
Va. Code Ann. 19.2-57 (Michie 1995) 15
W. Va. Code § 62-1A-4 (1997) 15
Wisc. Stat. Ann. § 968.17 (West 1985) 15
Wyo. Stat. Ann. § 7-7-102 (Michie 1997) .....
Ala. R. Crim. P. 3.11 14
Alaska R. Crim. P. 37 14
Ark. R. Crim. P. 13.3 14
Colo. R. Crim. P. 41 14
Del. Ct. C.P. Crim. R. 41 14
Del. Super. Ct. Crim. R. 41 14
D.C. Super. Ct. R. Crim. P. 41 14
Fed. R. Crim. P.:
Rule 41 ..... 13, 20
Rule 41(d) 1, 7, 13, 14, 15
Rule 41(e) 11, 20
Haw. R. Penal P. 41 14
Idaho Crim. R. 41 14

Rules—Continued: Page

Ky. R. Crim. P. 13.10 14
Me. R. Crim. P. 41 14
Md. R. Crim. P. 4-601 14
N.D. R. Crim. P. 41 15
N.J. R. Crim. Prac. 3:5-5 15
N.M. R. Crim. P. - Dist. Ct. 5-211 15
N.M. R. Crim. P. - Mag. Ct. 6-208 15
N.Y. Crim. Proc. Law § 690.50 (McKinney 1995) 15
Ohio R. Crim. P. 41 15
Pa. R. Crim. P.:
§ 2008 15
§ 2009 15
R.I. Super. Ct. R. Crim. P. 41 15
S.D. Codified Laws § 23A-35-10 (Rule 41(d)) (Michie 1988) 15
Tenn. R. Crim. P. 41 15
Vt. R. Crim. P. 41 15
W. Va. R. Crim. P. 41 18
Wash. R. Crim. P. 2.3 (Super. Ct.) 15
Wyo. R. Crim. P. 41 15

Miscellaneous:

Charles A. Wright, 3 *Federal Practice and Procedure* (2d ed. 1982 & Supp. 1998) 20
The American Law Institute, *Model Code of Pre-Arraignment Procedure*, Pt. II, § SS 220.3(4) and (5) 14

In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1230

CITY OF WEST COVINA, PETITIONER

v.

LAWRENCE PERKINS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The court of appeals held that a law enforcement agency that seizes property pursuant to a warrant must provide written notice to the property owner of the procedure for seeking return of the property taken, along with any additional information required for initiating that procedure in the appropriate court. Pursuant to Federal Rule of Criminal Procedure 41, the Federal Bureau of Investigation and other federal law enforcement agencies seize property pursuant to search warrants in full compliance with federal law but without giving the notice required by the court of appeals. Because the decision in this case, if upheld

by this Court, would require substantial modification of the practices of federal law enforcement agencies, the United States has an interest in the Court's resolution of the question presented.

STATEMENT

1. On May 8, 1993, Julio Alberto Clark was shot to death in the City of West Covina, California. Pet. App. A3. The City of West Covina Police Department uncovered evidence linking Marcus Marsh to the murder and learned that Marsh had rented a room in the home of respondent Lawrence Perkins. *Ibid.* Citrus Municipal Court Judge Dan Thomas Oki issued a search warrant that authorized the search of respondent's house for "evidence of street gang membership or affiliation with a street gang," and "any and all firearms for which the person in possession of said firearms cannot tender proof of ownership at the time of service." *Ibid.*

Detectives David Melnyk, Michael Ferrari, Dan Nalian, and Lieutenant John Schimanski executed the search warrant. Pet. App. A4. No one was home, and the detectives did not know in which room Marsh lived. *Ibid.* During the search, the detectives seized gang photos depicting Marsh, an address book, a twelve-gage shotgun, a starter pistol, ammunition, and $2,469 in cash. *Ibid.* The house was left in disarray, and the doors and some personal items were damaged. *Ibid.*

After the search, the officers left a form entitled "Search Warrant: Notice of Service." J.A. 76-77; Pet. App. A4. The notice stated:

> To Whom it May Concern:
>
> 1. These premises have been searched by peace officers of the West Covina Police Department pursuant to a search warrant issued on 5-20-93, by the Honorable Dan Oki, judge of the Municipal Court, Citrus Judicial District.
> 2. The search was conducted on 5-21-93. A list of the property seized pursuant to the search warrant is attached.
> 3. If you wish further information, you may contact Det. Ferrari or Det. Melnyk at [telephone number].

Id. at A4-A5. The form also provided Lieutenant Schimanski's name and telephone number. *Id.* at A5.

Respondent spoke to Detective Ferrari about obtaining the return of the $2,469 that had been seized. Pet. App. A5. Ferrari told respondent that he had no objection to the return of the money, but that respondent would have to obtain a court order. *Ibid.* Respondent went to the Citrus Municipal Court and asked to see Judge Oki, but was told by a member of the clerk's office that Judge Oki was on vacation. *Ibid.* When respondent attempted to obtain the return of his money from another judge, he was told that he could not do so without the number of the search warrant or a case number. *Ibid.* The warrant, however, was sealed, and there was no case number for Marsh's case because charges had not yet been filed against him. *Ibid.* A public document in the clerk's office listed the warrant and the warrant number under the address where the search occurred. *Id.* at A6. No one informed respondent about that

method for obtaining the warrant number, however, and respondent did not make any additional inquiry about how to obtain that number. *Ibid.*

Respondent filed suit in the United States District Court for the Central District of California against the City of West Covina (petitioner) and the officers involved in the search of his house, alleging that they had violated his rights under the Fourth and Fourteenth Amendments. Pet. App. A6. In particular, respondent alleged that the officers had conducted the search without probable cause and that the scope of the search exceeded the scope of the warrant. J.A. 7-9. Respondent also alleged that petitioner had a policy of permitting such unlawful searches. J.A. 10. Respondent sought compensatory and punitive damages and attorneys' fees. J.A. 11. After respondent's suit was filed, petitioner filed a motion in Citrus Municipal Court for return of respondent's property (J.A. 81-82), and, on order of the court (J.A. 85), returned all of respondent's property except the starter pistol (which someone else had reported stolen). Pet. App. A7.

2. The district court entered summary judgment against respondent on the claims that he made, Pet. App. B1-B11, but invited supplemental briefing on an issue not raised by respondent—whether the remedies available to respondent for the return of seized property were sufficient to satisfy the Due Process Clause of the Fourteenth Amendment, *id.* at B7. Although the parties submitted such briefs, the district court did not resolve the due process issue. *Id.* at D1-D2. The court of appeals remanded to the district court so that it could resolve that issue. *Id.* at D1-D3.

On remand, the district court granted summary judgment in favor of petitioner, holding that the remedy provided by California law for the return of seized property satisfied the Due Process Clause. Pet. App. E1-E8. The court rejected respondent's claim that he had received inadequate notice of the procedure for seeking the return of his property. *Id.* at E7. The court noted that respondent was told that he needed a court order, he was told which court and judge had authority to issue such an order, and he was given the date of the warrant and of the search. *Ibid.* That information, the court concluded, was all that respondent needed "in order to submit an informal written request to the court having jurisdiction over his property." *Ibid.*

3. The court of appeals reversed in relevant part. Pet. App. A1-A25. The court held that the remedies provided by California law for the return of seized property satisfy the Due Process Clause. *Id.* at A16-A17. Relying on *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1 (1978), the court held, however, that respondent did not receive constitutionally adequate notice of his remedies because the notice left at his home did not inform him of the availability of a judicial procedure to seek the return of his property or provide him with any guidance for invoking that remedy. Pet. App. A17-A22. After applying a balancing test under *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), the court held that, in cases where property is taken under California law, the notice left with the owner of the property should include all the information included in the notice left at respondent's house—"the fact of the search, its date, and the searching agency; the date of the warrant, the issuing judge, and the court in which he or she serves; and the

persons to be contacted for further information." Pet. App. A22. The court also concluded that the Due Process Clause requires the following additional elements of notice:

> In addition, the notice must inform the recipient of the procedure for contesting the seizure or retention of the property taken, along with any additional information required for initiating that procedure in the appropriate court. In circumstances such as those presented by this record, the notice must include the search warrant number or, if it is not available or the record is sealed, the means of identifying the court file. It also must explain the need for a written motion or request to the court stating why the property should be returned.

Ibid.

Judge Leavy dissented in relevant part. Pet. App. A23-A25. He concluded that the notice requirements mandated by the majority would be appropriate only in cases in which due process demands the opportunity for a predeprivation hearing. *Id.* at A24. Since property may be lawfully seized pursuant to a warrant without a predeprivation hearing and because California law affords an adequate post-deprivation remedy, Judge Leavy concluded that the Due Process Clause did not require petitioner "to advise [respondent] of his remedies." *Id.* at A25.

SUMMARY OF ARGUMENT

The court of appeals erred in holding that the Due Process Clause requires a law enforcement agency that seizes property under a warrant to provide written notice to property owners of the judicial pro-

cedure for seeking return of the property and the information required to initiate that procedure. The due process "notice" requirement is satisfied when law enforcement officers give individualized notice that property has been seized. The government may then rely on the public availability of applicable laws and rules of procedure to inform persons of their legal remedies and how to invoke them.

Individualized notice that property has been taken under a court-ordered warrant is the traditional form of notification provided to property owners. That is the kind of notice required by Federal Rule of Criminal Procedure 41(d) and by the vast majority of States. Neither Rule 41(d) nor the laws of any State require individualized notice of legal remedies and how to invoke them. That traditional practice is strong evidence that the court of appeals' notice obligations exceed what the Due Process Clause requires.

Decisions of this Court make clear that Rule 41(d) and comparable state rules provide all the notice of legal remedies that due process requires. In a variety of contexts, this Court has held that, once the government adequately notifies a property owner that his property has been taken, the government may rely on its published laws to provide the owner with notice of his legal remedies and the procedures for invoking them. Those cases recognize that it is generally fair to entrust persons who are directly affected by government action with the responsibility to take the initiative to learn about their legal remedies, because "[t]he entire structure of our democratic government rests on the premise that the individual citizen is capable of informing himself about the particular

policies that affect his destiny." *Atkins* v. *Parker*, 472 U.S. 115, 131 (1985).

Compliance with the court of appeals' notice requirements would impose substantial new burdens on the government without providing a significant benefit to property owners. It would require the government to make difficult legal judgments about which of several possible legal remedies are available in particular circumstances; it could readily result in notice that is so complex that it loses its value as a guide to action; and it would invite years of litigation over what kind of notice is sufficient and the appropriate remedies for a notice violation. Since an assessment of the propriety of actual notice must take into account "the practicalities of the situation and the effect that requiring actual notice would have on important state interests," *Tulsa Prof'l Collection Servs., Inc.* v. *Pope*, 485 U.S. 478, 489 (1988), the court of appeals' notice requirements cannot be justified as elements of due process.

The court of appeals' reliance on *Memphis Light, Gas & Water, Div.* v. *Craft*, 436 U.S. 1 (1977), as support for its notice obligations, is misplaced. That case addressed the question of when an agency must give individualized notice of predeprivation procedures administered by the agency itself. It does not suggest that a law enforcement agency must inform persons about postdeprivation legal remedies administered and interpreted by courts.

ARGUMENT

THE NOTICE COMPONENT OF DUE PROCESS IS SATISFIED WHEN LAW ENFORCEMENT OFFICERS INFORM PERSONS THAT THEIR PROPERTY HAS BEEN SEIZED UNDER WARRANT AND PUBLICLY AVAILABLE LAWS INFORM PERSONS ABOUT THE PROCEDURES FOR SEEKING RETURN OF THEIR PROPERTY

The minimum requirement of due process is notice and an opportunity for a hearing before a person is finally deprived of a liberty or property interest. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). This case involves the "notice" aspect of due process. In the context of a seizure of property pursuant to a warrant, the notice component of due process is satisfied when law enforcement officers give individualized notice that property has been seized under warrant and publicly available laws and procedures inform persons of their legal remedies and how to pursue them. The court of appeals erred in imposing more extensive notice requirements.

A. California Provides Adequate Postdeprivation Procedures For The Return Of Property, And The Only Question Is Whether Property Owners Have Adequate Notice Of Those Procedures

1. The court of appeals correctly held in this case that California complies with the due process requirement of an opportunity for a hearing by providing for a post-deprivation procedure to request the return of property seized under warrant. Although due process sometimes requires the government to provide an opportunity for a hearing before the initial

deprivation of a property interest, "where a State must act quickly, or where it would be impractical to provide predeprivation process, postdeprivation process satisfies the requirements of the Due Process Clause." *Gilbert* v. *Homar*, 117 S. Ct. 1807, 1812 (1997). The seizure of property under a search warrant is one of the those situations in which a predeprivation hearing is not required. *Fuentes* v. *Shevin*, 407 U.S. 67, 93-94 n.30 (1972). In *Fuentes*, the Court explained the reasons:

> First, a search warrant is generally issued to serve a highly important governmental need—*e.g.*, the apprehension and conviction of criminals * * *. Second, a search warrant is generally issued in situations demanding prompt action. The danger is all too obvious that a criminal will destroy or hide evidence or fruits of his crime if given any prior notice. Third, the Fourth Amendment guarantees that the State will not issue search warrants merely upon the conclusory application of a private party. It guarantees that the State will not abdicate control over the issuance of warrants and that no warrant will be issued without a prior showing of probable cause.

Ibid. That does not mean that the State may retain custody of property seized pursuant to a warrant for an indeterminate period without providing any opportunity for a hearing. Under general due process norms, the State must make available "some meaningful opportunity subsequent to the initial taking for a determination of rights and liabilities." *Parratt* v. *Taylor*, 451 U.S. 527, 540-541 (1981).

As the court of appeals in this case concluded (Pet. App. A15-A17), California law provides postdeprivation remedies that satisfy that requirement. In particular, California Penal Code Section 1536 authorizes a court to entertain a "nonstatutory" motion for the release of property seized under a search warrant, Pet. App. A15-A16 (citing cases construing Section 1536), and California Penal Code Section 1540 authorizes a motion for return of property when the property is not the same as that described in the warrant or when the warrant was not supported by probable cause, Pet. App. A16-A17 (quoting code provision). Those remedies parallel the remedy provided by Rule 41(e) of the Federal Rules of Criminal Procedure, which states that "[a] person aggrieved by an unlawful search and seizure or by the deprivation of property may move the district court for the district in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property." The California remedies, like Rule 41(e), provide persons whose property has been seized pursuant to a warrant with a meaningful opportunity for a determination of their right to the property. Those remedies therefore satisfy the due process hearing requirement.

2. The question in this case is whether the State gave adequate "notice" of its procedures. The Due Process Clause requires notice that is sufficient to make the opportunity for a hearing meaningful. *Mullane*, 339 U.S. at 314. The court of appeals held that the notice provided to respondent did not satisfy that requirement, because it did not inform respondent of the availability of a judicial remedy or provide him with any guidance for invoking that remedy. Pet. App. A17-A22. The court then set forth what amounts

to a detailed code prescribing the notice that must be provided in cases in which property is seized pursuant to a warrant. The court held that notice should include all the information included in the notice left at respondent's house—"the fact of the search, its date, and the searching agency; the date of the warrant, the issuing judge, and the court in which he or she serves; and the persons to be contacted for further information." *Id.* at A22. The court also established the following additional requirements for constitutionally sufficient notice:

> In addition, the notice must inform the recipient of the procedure for contesting the seizure or retention of the property taken, along with any additional information required for initiating that procedure in the appropriate court. In circumstances such as those presented by this record, the notice must include the search warrant number or, if it is not available or the record is sealed, the means of identifying the court file. It also must explain the need for a written motion or request to the court stating why the property should be returned.

Ibid.

The notice requirements devised by the court of appeals far exceed what the Due Process Clause requires. When law enforcement officers seize property under a warrant, due process is satisfied by the form of notification to property owners traditionally provided: individualized notice that government officers have seized property under authority of a court-issued warrant. The government may then rely on the public availability of applicable laws and rules of

procedure to inform persons of their legal remedies and how to invoke them.

B. The Traditional Form Of Notice That Law Enforcement Officers Provide To Property Owners Is Notice That Identified Property Has Been Seized

1. Federal Rule of Criminal Procedure 41(d) sets forth the information that federal law enforcement agents must provide when they seize property pursuant to a warrant. It provides that "[t]he officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken." Fed. R. Crim. P. 41(d). Rule 41 therefore requires individualized notice that a law enforcement agency has seized identified property pursuant to a court-issued warrant. The warrant and receipt left by the Federal Bureau of Investigation also contain some of the additional information required by the court of appeals, such as the name of the issuing magistrate, and the date of the search. They do not, however, "inform the recipient of the procedure for contesting the seizure or retention of the property taken," or with "any additional information required for initiating that procedure in the appropriate court." Pet. App. A22. Notice of that information is provided by Rule 41 itself and other applicable laws, including the local rules of district courts. By requiring the government to provide owners with individualized notice of the procedure for seeking the return of property and with all information required for initiating that procedure, the decision below effectively concludes that the notice provided by the

federal government when it seizes property pursuant to a warrant is constitutionally inadequate.

The court's ruling breaks sharply from the traditions and practice in this country. Rule 41(d) simply restates federal statutory requirements that have existed since 1917. Act of June 15, 1917, ch. 30, Tit. XI, § 12, 40 Stat. 229. The American Law Institute's Model Code of Pre-Arraignment Procedure contains provisions that track Rule 41(d) in the relevant respects. American Law Institute, *A Model Code of Pre-Arraignment Procedure*, Pt. II, § SS 220.3(4) and (5). And while the vast majority of States statutorily require individualized notice that property has been seized, no State requires individualized notice of the procedures for seeking return of property or how to invoke them.[1] That history and practice is important

[1] See Ala. Code § 15-5-11 (1995); Ala. R. Crim. P. 3.11; Alaska Stat. § 12.35.030 (Michie 1996); Alaska R. Crim. P. 37; Ariz. Rev. Stat. Ann. §§ 13-3919 to 13-3922 (West 1989); Ark. R. Crim. P. 13.3; Cal. Penal Code § 1535 (West 1982); Colo. Rev. Stat. § 16-3-305 (1997); Colo. R. Crim. P. 41; Conn. Gen. Stat. Ann. §§ 54-33c, 54-36f (West Supp. 1998); Del. Ct. C.P. Crim. R. 41; Del. Super. Ct. Crim. R. 41; D.C. Code Ann. § 23-524 (1996); D.C. Super. Ct. R. Crim. P. 41; Fla. Stat. Ann. § 933.11 (West 1996); Ga. Code. Ann. §§ 17-5-25, 17-5-29 (1997); Haw. R. Penal P. 41; Idaho Code §§ 19-4413, 19-4415, 19-4416 (1997); Idaho Crim. R. 41; 725 Ill. Comp. Stat. Ann. 5/108-6, 5/108-10 (West 1992) (effective Jan. 1, 1993); Ind. Code Ann. §§ 35-33-5-2 to 35-33-5-7 (Michie 1998); Iowa Code Ann. § 808.8 (West 1994); Kan. Stat. Ann. §§ 22-2506, 22-2512 (1995 & Supp. 1997); Ky. R. Cr. P. 13.10; La. Code Crim. Proc. Ann. art. 166 (West 1991); Me. R. Crim. P. 41; Md. R. Crim. P. 4-601; Mass. Ann. Laws ch. 276, §§ 1 to 4 (Law. Co-op. 1992 & Supp. 1998); Mich. Comp. Laws § 780.655 (West 1982); Minn. Stat. Ann. §§ 626.16, 626.17 (West Supp. 1998); Miss. Code Ann. §§ 41-29-157(a)(3), 99-27-15 (1994); Mo. Ann. Stat. § 542. 291 (West Supp. 1998); Mont. Code Ann. §§ 46-5-227, 46-5-301 (1997); Neb. Rev. Stat. Ann. § 29-815 (Michie 1995); Nev. Rev. Stat. Ann. § 179.075 (Michie 1997); N.H. Rev. Stat. Ann. § 595-A:5 (1986); N.J. Stat. Ann. § 33:1-61 (West 1994); N.J. R. Crim. Prac. 3:5-5; N.M. R. Crim. P. - Dist. Ct. 5-211; N.M. R. Crim. P. - Mag. Ct. 6-208; N.Y. Crim. Proc. Law § 690.50 (McKinney 1995); N.C. Gen. Stat. §§ 15A-252, 15A-254 (1997); N.D. R. Crim. P. 41; Ohio Rev. Code Ann. § 2933.24.1 (Anderson 1996); Ohio R. Crim. P. 41; Okla. Stat. Ann. tit. 22, §§ 1229 to 1234 (West 1986); Or. Rev. Stat. §§ 133.575, 133.595 (1995); Pa. R. Crim. P. 2008, 2009; R.I. Super. Ct. R. Crim. P. 41; S.C. Code Ann. § 17-13-150 (Law. Co-op. 1985); S.D. Codified Laws § 23A-35-10 (Rule 41(d)) (Michie 1988); Tenn. R. Crim. P. 41; Tex. Crim. P. Code Ann. § 18.06 (West 1977 & Supp. 1998); Utah Code Ann. § 77-23-206 (1995); Vt. R. Crim. P. 41; Va. Code Ann. 19.2-57 (Michie 1995); Wash. R. Crim. P. 2.3 (Super. Ct.); W. Va. Code § 62-1A-4 (1997); W. Va. R. Crim. P. 41; Wisc. Stat. Ann. § 968.17 (West 1985); Wyo. Stat. Ann. § 7-7-102 (Michie 1997); Wyo. R. Crim. P. 41.

evidence that, when property is seized pursuant to a warrant, notice that property has been seized is sufficient to satisfy due process. See *Medina* v. *California*, 505 U.S. 437, 446-448 (1992); *id.* at 453-454 (O'Connor, J., concurring in the judgment); *Burnham* v. *Superior Court of Cal.*, 495 U.S. 604, 619-622 (1990) (plurality opinion); *id.* at 628 (White, J., concurring in the judgment); *id.* at 629 (Brennan, J., concurring in the judgment).

C. Decisions Of This Court Establish That The Government May Generally Rely On The Applicable Law To Inform Property Owners Of Their Legal Remedies And How To Invoke Them

Decisions of this Court make clear that Rule 41(d) and comparable state rules provide all the notice of available legal remedies that is required by the Due Process Clause. In a variety of contexts, the Court has held that where the government adequately notifies a property owner that his property has been or is

about to be taken, the government may rely on its published laws to provide the owner with notice of his legal remedies and the procedures for invoking them.

1. In *North Laramie Land Co.* v. *Hoffman*, 268 U.S. 276, 280 (1925), a Board of County Commissioners notified land owners through newspaper publication about its decision to take land to establish a road. A state statute provided that landowners had 30 days from the date of that decision to file a claim for damages. *Id.* at 283-284. The Court held that the notice of the initiation of the proceedings to establish the road was adequate, *id.* at 285, and that the state statute gave landowners adequate notice of the procedure for filing a claim for damages. The Court explained that "[a]ll persons are charged with knowledge of the provisions of statutes and must take note of the procedure adopted by them," *id.* at 283, and it viewed that principle as having special force in the context of tax or condemnation proceedings affecting road property, *ibid.*

Similarly, in *Reetz* v. *Michigan*, 188 U.S. 505, 509 (1903), a board of registration for the practice of medicine notified an applicant that it had rejected his application, and a state statute required the board to meet at specified times during which time an applicant could have a hearing on his application. *Ibid.* The Court held that the state statute provided adequate notice to applicants of the procedure for obtaining a hearing concerning their qualifications. *Ibid.* The Court explained that "[w]hen a statute fixes the time and place of meeting of any board or tribunal, no special notice to parties interested is required. The statute is itself sufficient notice." *Ibid.*

And in *Anderson Nat'l Bank* v. *Luckett*, 321 U.S. 233, 237 (1944), a state statute required notice to be posted at a courthouse that certain unused bank accounts were presumed abandoned and would be turned over to the State. The statute also set forth the circumstances in which property would be presumed abandoned, specified the procedure that persons should follow if they wished to make a claim on the deposits, and defined the time periods for making such claims. *Id.* at 237-238. The Court held that the "statute itself" provided adequate notice of the procedural rights afforded to bank depositors and that this was sufficient to satisfy due process. *Id.* at 242. The Court explained that "[a]ll persons having property located within a state and subject to its dominion must take note of its statutes affecting the control or disposition of such property and of the procedure which they set up for those purposes." *Ibid.*; see *id.* at 244 (posted notice, "when read in the light of the knowledge of the statute, with which all persons having such bank accounts within the state are chargeable," adequately informed depositors of their opportunity to be heard and the procedures for invoking their rights).

North Laramie Land Co., *Reetz*, and *Anderson Nat'l Bank* involved different methods for notifying persons that their interest in property was affected or about to be affected: in *North Laramie*, the government relied on newspaper publication; in *Reetz*, the government gave individualized notice; and in *Anderson Nat'l Bank*, the government posted notice at the courthouse. The key point is that in all three cases, the Court held that, once an individual was provided notice that his property was subject to some potential government action, the statute at issue

supplied adequate notice of the procedure for challenging the deprivation of property. That principle is controlling here. See also *Texaco, Inc.* v. *Short*, 454 U.S. 516, 532 (1982) ("It is well established that persons owning property within a State are charged with knowledge of relevant statutory provisions affecting the control or disposition of such property.").

2. The principle that property owners are charged with knowledge of the law recognizes that it is generally fair to entrust persons who are directly affected by government action with the responsibility to take the initiative to learn about their legal rights and remedies. Individuals may acquire the necessary information about their legal remedies by consulting available materials at a library or courthouse, by making informal inquiries to government officials, by talking with persons they know who have relevant experience, by seeking free legal advice, or by hiring a lawyer if necessary. The apparent starting point for the court of appeals' decision—that individuals are incapable of asserting their legal rights unless the government provides individualized notice of the remedies that are available and how to assert them—is not consistent with the experience in this country. "The entire structure of our democratic government rests on the premise that the individual citizen is capable of informing himself about the particular polices that affect his destiny." *Atkins* v. *Parker*, 472 U.S. 115, 131 (1985). The court of appeals' holding in this case necessarily and incorrectly "reject[s] that premise." *Ibid.*

The situation of someone whose property has been seized is analogous to that of a potential plaintiff who has been injured by a potential defendant. Due process does not require a potential defendant to alert

the potential plaintiff to his possible legal remedies. See *Short*, 454 U.S. at 536. The law fairly imposes the burden on the plaintiff to obtain information concerning his possible legal remedies, because "[h]aving suffered the triggering event of an injury, a potential plaintiff is likely to possess a heightened alertness to the * * * requirements of law bearing on his claim." *Id.* at 549 (Marshall, J., dissenting). That is true even when state action may threaten personal or property interests.[2] A person whose property has been seized pursuant to a warrant is in a similar position. A "direct attack" upon property rights "may reasonably be expected to convey a warning," making individualized notice of hearing rights set forth in public statutes and rules, unnecessary. *Mullane*, 339 U.S. at 316.

---

[2] For example, in *Ingraham* v. *Wright*, 430 U.S. 651, 674-682 (1977), the Court held that legal tort remedies against teachers who subject children to excessive corporal punishment satisfy due process requirements and that teachers may therefore impose corporal punishment without a prior hearing. Similarly, in *Parratt*, 451 U.S. at 542, the Court held that a tort remedy for unjustified destruction of property by prison officials satisfies due process. School systems that impose corporal punishment, however, need not inform children who have been subjected to corporal punishment that they have a right to file a tort suit alleging excessive punishment, or provide the children with information required to file such a suit in the appropriate court. Nor must prison institutions inform prison inmates who complain to them about the destruction of their property that they have the right to file a tort suit, or give the inmates any information that is required to file such a suit.

D. The Court Of Appeals' Notice Obligations Would Impose Substantial New Burdens On The Government Without Providing A Significant Benefit To Property Owners

1. Compliance with the court of appeals' notice requirements would impose substantial new burdens on the government. Providing an individual with accurate and complete information about his potential legal remedies for an unlawful seizure or retention of property under a warrant is by no means simple. For example, a federal notice of remedies could begin with a statement that "[a] person aggrieved by an unlawful search and seizure or by the deprivation of property may move the district court for the district in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property," Fed. R. Crim. P. 41(e), but unless such a notice were significantly qualified and expanded, it would be affirmatively misleading. A person who has an indictment or information filed against him may be limited to a motion to suppress that must be filed in the district court in which the criminal case against him is pending. Charles A. Wright, 3 *Federal Practice and Procedure* § 673, at 761 (2d ed. 1982). Once a criminal case is completed, a person may have to file an independent civil action, rather than a Rule 41 motion. *Id.* at 764-765. An independent civil action may also be an alternative remedy before indictment. *Ibid.* A Rule 41 motion may not be available when an administrative agency begins an administrative forfeiture process. *Id.* (Supp. 1998), at 247. And when the property is in the possession of state rather than federal officials, Rule 41 may not apply. *Ibid.* As those examples illustrate,

the appropriate remedy depends on the facts of a particular case; there is no universal answer.

Compliance with the court of appeals' ruling would therefore require the government to make difficult legal judgments about what remedies are available in particular circumstances as well how much information to provide about each remedy. It could readily result in notice that is so complex and so qualified that it loses its value as a guide to action. And it would invite years of litigation over the adequacy of the government's notice and the appropriate remedy for any "notice" violation. Those problems could be alleviated by reducing the required notice to a simple statement that persons who are aggrieved may have a legal remedy. But such a notice merely provides information that most persons in this country already know or could easily discover.

2. The court's requirement that the government must inform the recipient of any information required for initiating an action in the appropriate court (the necessary information requirement) raises equally substantial concerns. The scope of the information that falls within that duty is not entirely clear. The specific information to which the court referred—the warrant number and notice of the need to file a written motion setting forth the basis for relief—is the kind of information that is normally provided by a clerk's office through local rules and other means. If the necessary information requirement were read to include all the information someone would need to know in order to file a document that complies with local rules, the notice supplied by law enforcement officers would have to duplicate large sections of the local rules. For example, such a notice would have to include all format requirements, such as whether

the motion must be typewritten, whether it must appear on a certain kind of paper, whether it must be paginated, whether it must be prepunched, whether it must be double-spaced, and so forth. See *e.g.*, Local Rules for the United States District Court of California, Rule 3.4. It would also have to include all the substantive information that must be included in the motion, such as whether the motion must contain a memorandum of points and authorities or the evidence upon which the movant intends to rely. See *e.g.*, *id.*, Rule 7.5.1. Since district courts throughout the country have adopted a wide variety of format and substantive requirements for motions, under a broad reading of the court's necessary information requirement, the government would have to devise district-specific notices, monitor changes in the local rules, and revise notices any time there is a change in local practice. Such an obligation would impose an extraordinary burden on the government.

The court's necessary information requirement could conceivably be read more narrowly to include only the specific information to which the court of appeals referred. Such a notice, however, would leave property owners unequipped to file a motion without substantial independent research or substantial assistance from someone familiar with the local rules, such as a member of the bar or a representative of the clerk's office. And once a person conducts such independent research or seeks out such assistance, he could be expected to learn about the specific information to which the court of appeals referred as well.

"In assessing the propriety of actual notice * * * consideration should be given to the practicalities of the situation and the effect that requiring actual

notice may have on important state interests." *Tulsa Prof'l Collection Servs., Inc.* v. *Pope*, 485 U.S. 478, 489 (1988). The court of appeals' notice obligations are either extremely burdensome to administer or so general as to lack significant value. In either event, they cannot be justified as elements of due process.[3]

E. The Court Of Appeals' Reasons For Imposing Its Notice Requirements Are Unpersuasive

1. The court of appeals sought to derive support for its notice requirements from *Memphis Light, Gas & Water, Div.* v. *Craft*, 436 U.S. 1 (1978). See Pet. App. A18-A19. The court's reliance on *Memphis Light* is misplaced. In *Memphis Light*, a municipal utility gave its customers a written notice stating that payment was overdue and that service would be discontinued if payment was not made by a particular date. 436 U.S. at 13. The notice did not inform customers that they could challenge the proposed discontinuation of service through an internal dispute resolution procedure. *Ibid.* The Court held that the Due Process Clause required the municipal utility to inform its customers of that internal procedure. *Id.* at 14-15.

---

[3] Congress and state legislatures, of course, are free to require more than the constitutional minimum and to specify that law enforcement personnel must provide individualized notice of the procedure for contesting particular kinds of seizures. For example, Congress has required individualized notice of the procedure for contesting a seizure of a conveyance for a drug-related offense. 21 U.S.C. 888(b). Congress and the state legislatures are equally free, however, to decide as a matter of policy that individualized notice is not necessary. The Due Process Clause leaves such policy choices to the legislative branches of government.

Memphis Light involved the question of what notice an agency must give about predeprivation procedures. In the predeprivation hearing context, individualized notice about the procedure for challenging government action may often be necessary to make the opportunity for a hearing a meaningful one. In *Memphis Light*, for example, customers were threatened with an immediate termination of a service, the "continuity of which [was] essential to health and safety." 436 U.S. at 15 n.16. Without individualized notice, customers may have been unable to learn about their opportunity for an informal hearing in time to prevent that "uniquely final deprivation." *Id.* at 20. In contrast, in the present context, the required hearing is a postdeprivation hearing, and persons whose property has been seized will have sufficient time to learn about their remedies through appropriate inquiries or research without suffering a final deprivation of property.

Equally important, *Memphis Light* involved the question whether an agency has a responsibility to inform persons about the agency's own internal procedures for contesting proposed agency action. An agency is often the most logical source for such information; indeed, in some cases, it may be the only available source. Moreover, the task of informing persons of internal agency procedures is often a manageable one. In contrast, in the present context, the relevant procedures are legal procedures administered by the courts. Information about such procedures is widely available in public sources, and requiring a law enforcement agency to inform persons about the diverse legal remedies administered and interpreted by the courts would create an undue administrative burden.

Thus, *Memphis Light* addressed the question of when an agency must give notice of predeprivation procedures administered by the agency itself. It does not suggest that a law enforcement agency must notify persons about postdeprivation legal remedies administered by the courts. See *Memphis Light*, 436 U.S. at 26 (Stevens, J., dissenting) (noting that the Court "wisely avoids" holding that customers must receive "an explanation of the legal remedies that are available if a wrongful termination should occur").

2. The court of appeals also sought to support its holding through application of the balancing process set forth in *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), which weighs (1) the private interest affected; (2) the risk of an erroneous deprivation without the proposed additional procedures; and (3) the government's interests in avoiding the proposed procedures. See Pet. App. A21-A22. The *Mathews* balancing process, however, is the method the Court uses in deciding what kind of hearing is required. The Court has not applied the *Mathews* balancing process in deciding what kind of notice must be provided. Instead, it has applied the standard derived from *Mullane*, which asks whether the notice given is sufficient to make the opportunity for a hearing meaningful. In *Memphis Light*, for example, the Court applied the *Mullane* standard in holding that a municipal utility must notify customers of the procedure for contesting a discontinuation of service. It did not apply *Mathews* balancing in that part of the opinion. 436 U.S. at 13-14. In contrast, the Court did conduct a balancing analysis under *Mathews* in deciding the kind of hearing that the municipality was required to provide. *Id.* at 15-17.

Moreover, whatever the applicability of *Mathews* balancing to notice questions generally, the principle that the law itself supplies adequate notice of legal remedies and the procedures for invoking them has not been subject to ad hoc balancing. Instead, that principle has been applied categorically, subject to a limited exception (not applicable here) for cases in which the law does not allow a sufficient period of time for a person to become familiar with its provisions before a final deprivation of property occurs. See *Short*, 454 U.S. at 532; *North Laramie*, 268 U.S. at 283-284; see also *Atkins*, 472 U.S. at 130. The court of appeals therefore erred in invoking *Mathews* balancing in support of its new notice requirements.

3. Finally, the court of appeals cited (Pet. App. A19-A20) the confusing and inaccurate advice that respondent may have received in this case as support for its new notice obligations. The possibility of occasionally receiving confusing or inaccurate advice from individual government officials, however, is inherent in any procedural system. Such random and isolated conduct on the part of government officials does not implicate the Due Process Clause. *Daniels* v. *Williams*, 474 U.S. 327, 330-332 (1986); *Parratt*, 451 U.S. at 541. Thus, while respondent may have received confusing or inaccurate advice from one or more government officials, that does not provide a basis for holding unconstitutional the general practice followed for many years in both the federal and state systems.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
MICHAEL R. DREEBEN
Deputy Solicitor General
IRVING L. GORNSTEIN
Assistant to the Solicitor General

JULY 1998

FILED
JUL 15 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 97-1230

In The

Supreme Court of the United States

October Term, 1997

CITY OF WEST COVINA,

Petitioner,

vs.

LAWRENCE PERKINS; CLARA PERKINS; APRIL PERKINS, a minor, by and through LAWRENCE PERKINS,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF ON THE MERITS IN SUPPORT OF THE PETITIONER

JULIA HAYWARD BIGGS
Counsel of Record
RUFUS C. YOUNG, JR.
Attorneys for Amici Curiae

BURKE, WILLIAMS & SORENSEN
611 West Sixth Street
Suite 2500
Los Angeles, California 90017
(213) 236-0600

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

40 pp

QUESTIONS PRESENTED

1. Where post-deprivation procedures for return of property are held to be adequate to meet due process requirements, may the court require more?

2. Are police officers and other municipal officials qualified and able to give the type of notice required by the Ninth Circuit in *Perkins v. City of West Covina*, 113 F.3d 1004 (1997)?

3. Did the Ninth Circuit correctly apply *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978), to the facts of this case?

4. Does the Ninth Circuit's notice requirement have an adverse impact on municipal liability?

Motion of *Amici Curiae* For Leave To File Brief on the Merits in Support of Petitioners

Pursuant to Supreme Court Rule 37.2, sixty-two cities, counties and towns within the State of California respectfully move for leave to file the accompanying *amicus curiae* brief in support of the petition in this case. These cities, counties and towns are listed in the Appendix to this brief. Counsel for petitioner has consented, but counsel for respondent has withheld consent.

INTEREST OF THE *AMICI CURIAE*

Amici respectfully submit that the ruling of the Ninth Circuit Court of Appeals in *Perkins* imposes a substantial and impractical burden on local governments that is contrary to public policy and law. If allowed to remain as controlling law, the ruling in Perkins will require local governmental entities to provide substantive legal advice with regard to court procedures for obtaining return of legally seized property, to those individuals whose property has been taken pursuant to legitimate and valid search warrants. Under the guise of an expanded "notice" requirement, the court has set forth a requirement for police officers and other city officials who are not attorneys to provide legal advice on matters outside their knowledge or control. The ruling poses the risk of expanded liability for local public entities for the unauthorized practice of law, as well as setting up

conflicting duties and obligations for local governmental employees.

July 16, 1998

Respectfully submitted,

BURKE, WILLIAMS & SORENSEN
JULIA HAYWARD BIGGS
RUFUS C. YOUNG, JR.
Attorneys for Amici Curiae

TABLE OF CONTENTS-

Page

QUESTIONS PRESENTED i

MOTION OF *AMICI CURIAE* FOR LEAVE TO FILE BRIEF ON THE MERITS IN SUPPORT OF PETITIONERS 1

TABLE OF AUTHORITIES iv

AMICUS CURIAE BRIEF 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. The *Perkins* court acknowledges that California post-deprivation procedures satisfy due process requirements for return of property, but then inexplicably demands more 2

A. The notice required by the court in *Perkins* goes well beyond established standards for notice of constitutionally protected rights 7

B. The *Perkins* notice requirement imposes an unwarranted duty on municipal officers who do not have legal training to provide legal advice contrary to law and sound public policy 9

1. Municipal officials are generally prohibited from giving legal advice because, in the usual case, they are not qualified to do so 10

2. Police Officers are not usually licensed attorneys or otherwise qualified to give legal advice 11

TABLE OF CONTENTS – Continued

Page

3. City Attorneys have the skill but not the legal authority to give advice for the benefit of individuals seeking to recover lawfully seized property..... 15

4. City clerks frequently deal with the law, but are prohibited from giving legal advice 16

5. Clerks of the court, who have direct knowledge concerning court rules and proceedings, are prohibited from giving legal advice to individuals 19

II. *Memphis Light's* notice requirement applies to municipally-created and controlled dispute resolution procedures, not to judicial procedures 20

III. The *Perkins* notice requirement unduly increases municipal liability 22

CONCLUSION 24

LIST OF APPENDICES

APPENDIX A
Letter from County of San Diego County Counsel to Julia Hayward Biggs Dated July 8, 1998.....App. 1

APPENDIX B
LAW OFFICERS OF CITIES SUBMITTING *AMICUS CURIAE* BRIEF.....App. 3

TABLE OF AUTHORITIES

Page

Cases

Anderson v. Nelson, 352 F.Supp. 1124 (1972) (D.C.W.D. CA) 2

Matthews v. Eldridge, 424 U.S. 319 (1976) 2

Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978) 8, 20, 21, 22

Miranda v. Arizona, 384 U.S. 436 (1966) 12, 13, 24

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1949) 2, 3

People v. Kuder, 90 Cal. App. 594 (1928) 19

People v. Merchants Protective Corp., 189 Cal. 531 (1922) 10

People v. Rhodes, 12 Cal. 3d 180 (1974) 15

Schneider v. County of San Diego 28 F.3d 80 (9th Cir. 1994) 4

Secondary Authority

12 Cal. Jur. 3d *Clerks of Court* § 1 (1972) 19

Statutes

Cal. Bus. & Pro. Code § 6126(a) 10

Cal. Gov't Code § 1031 11

Cal. Gov't Code § 24004 11

Cal. Gov't Code § 24004.5 12

Cal. Gov't Code § 36502 17

Cal. Gov't Code § 36503 17

TABLE OF AUTHORITIES – Continued

Page

Cal. Gov't Code § 40801 17

Cal. Gov't Code § 40802 17

Cal. Gov't Code § 40803 18

Cal. Gov't Code § 40806 18

Cal. Gov't Code § 40810 18

Cal. Gov't Code § 40811 18

Cal. Gov't Code § 40812 18

Cal. Gov't Code § 40813 18

Cal. Gov't Code § 40814 18

Cal. Gov't Code § 41801 15

Cal. Gov't Code § 41805 15

Cal. Veh. Code § 22660 ..... 4, 5

42 U.S.C. § 1983 ..... 22, 23

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER CITY OF WEST COVINA[1]

SUMMARY OF ARGUMENT

This brief is submitted on behalf of sixty-two cities, counties and towns within the State of California as amici curiae in support of the Petitioner City of West Covina to review the judgment of the United States Court of Appeals for the Ninth Circuit in the case of *Perkins v. City of West Covina*, 113 F.3d 1004 (1997) (CA9), which is set forth as Appendix A to Petitioner's Appeal Brief (the "Pet. App.") filed by Petitioner in this action.

Amici respectfully submit that the ruling of the Ninth Circuit Court of Appeals in *Perkins* imposes a substantial and impractical burden on local governments that is contrary to public policy and law. If allowed to remain as controlling law, the ruling in *Perkins* will require local governmental entities to provide substantive legal advice with regard to court procedures for obtaining return of legally seized property to those individuals whose property has been taken pursuant to legitimate and valid search warrants. Under the guise of an expanded "notice" requirement, the court has set forth a requirement for police officers and other city officials who are not attorneys to provide legal advice on matters outside their knowledge or control. The ruling poses the risk of expanded liability for local public entities for the unauthorized practice of law, as well as setting up conflicting duties and obligations for local governmental employees.

---

[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

Amici urge the Court to reverse the determination of the Court of Appeal.

ARGUMENT

I. The *Perkins* court acknowledges that California post-deprivation procedures satisfy due process requirements for return of property, but then inexplicably demands more.

The Supreme Court has held that due process of law requires that an individual deprived of property under color of law be given notice and an opportunity to be heard before such deprivation becomes permanent. *Matthews v. Eldridge*, 424 U.S. 319 (1976). According to the Court in *Matthews*, "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *Id.* at 333. However, due process "is not a fixed set of rights, it 'is flexible and calls for such procedural protections as the particular situation demands.' " *Anderson v. Nelson*, 352 F.Supp. 1124, 1128 (1972) (D.C.N.D. CA). Thus, the type of notice required by procedural due process varies according to the facts of each case.

The Supreme Court has established a constitutional minimum for sufficient notice. Notice should be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1949). Additionally, "[t]he notice must be of such

nature as reasonably to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance." *Id.* Moreover, "[t]he reasonableness and hence the constitutional validity of any chosen method may be defended on the grounds that it is in itself reasonably certain to inform those affected." *Id.* at 315. Thus, constitutionally sufficient notice does not require that an individual be informed of his legal recourse in a particular situation, but merely that he be informed that an action is pending against him in a manner that allows him to defend against the action.

In *Perkins*, the Ninth Circuit Court of Appeal acknowledged the adequacy of California law relating to post-deprivation procedures for return of property. The court stated as follows:

> "Perkins thus had available to him post-deprivation procedure for the return of his property – a 'nonstatutory' motion under § 1536 and a § 1540 motion. We agree with the California Supreme Court that '[t]hese various remedies satisfy the requirements of due process. [citation omitted]. . . .
>
> Due process notice 'must be of such nature as reasonably to convey the required information.' *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950). The 'notice' left at Perkins' home simply informed him that his home had been searched by the West Covina police department, with the date of the search warrant and the issuing judge and court, the date of the search, a list of the property seized, and the names and telephone numbers of several officers of the police department to contact for 'more information.' The issue is whether due

> process required more: that the police notify Perkins of the availability of a judicial remedy should he wish to claim his property, and provide some guidance for invoking that remedy." Pet. App. A-17-19.

The question is indeed "whether due process requires more" than notice of the existence of a process acknowledged by the reviewing court to be adequate. Amici contend that it does not.

The Ninth Circuit Court of Appeals has consistently expanded and embellished the requirements imposed on local government with regard to notice in recent years, apparently on the theory that "more" is always required. For example, in *Schneider v. County of San Diego*, 28 F.3d 89 (9th Cir. 1994), a case cited by the court in *Perkins*, the Ninth Circuit ruled that even though notice was properly given in advance of an administrative hearing regarding zoning violations and state vehicle code nuisance abatement procedures, "more" was needed. In that case, a landowner was storing a large number of cars, most in inoperable condition on agriculturally zoned property.

The County gave notice of abatement, including notice that inoperable vehicles would be destroyed, pursuant to County codes and the provisions of the California Vehicle Code § 22660. An administrative hearing was held based on that notice at which the landowner did not contest the issue of whether the vehicles themselves constituted a nuisance under the vehicle code. The hearing officer ruled against the landowner and in favor of the County of San Diego on the zoning issue, but made no finding on the uncontested vehicle nuisance abatement issue. The court ruled that "more" notice was required

before the County could legally destroy the seized vehicles.

The reasoning of the court creates a presumption in favor of the property owner that carries through the administrative proceeding and then requires "more" notice: The court said,

> "The County did not violate Schneider's due process rights when it abated the nuisance on his property by removing the vehicles. However, the record does not show that the vehicles themselves were nuisances. The hearing officer affirmed the nuisance finding pursuant to Regulatory Code § 16.-210, on the theory that Schneider's vehicles were parked in violation of county zoning ordinances. This action was binding on the County and Reybro as well as Schneider. Once the vehicles were removed from the property the nuisance abatement was complete and the County was only authorized "to otherwise proceed pursuant to sections 16.-212 through 16.-217 of the San Diego Code of Regulatory Ordinances." These sections do not authorize the destruction of vehicles; they provide a procedure for recovering the cost of the abatement proceedings.

The County and Reybro argue that because the posted NOTICE AND ORDER TO ABATE informed Schneider that he was in violation of County Code § 78.101, he was on notice that his vehicles could be disposed of pursuant to section 78.114, "by removal to a scrap yard or licensed automobile dismantler's yard." However, San Diego County Code §§ 78.101 through 78.118 and their authorizing statute, California Vehicle Code § 22660, apply only to vehicles

declared to be public nuisances because they are "abandoned, wrecked, dismantled, or inoperative. [Citations omitted.]

We hold that following the hearing officer's order the County was obligated to proceed on the theory that Schneider's vehicles were nuisances only because they were parked in violation of county zoning ordinances. Therefore, County Code § 78.114 was not applicable to Schneider's vehicles and the citation of County Code § 78.114 in the NOTICE AND ORDER TO ABATE did not provide Schneider the notice required by due process." [Citations omitted] 28 F.3d 89 at 93.

Thus, even though proper and adequate notice was given in advance of the administrative hearing that the vehicles could be destroyed, the silence of the hearing officer on the uncontested issue of the inoperable condition of the vehicles was sufficient in the mind of the court to require "more" notice and to prevent the County from carrying out the complete abatement remedy that had already been noticed.

Due process here, as in *Perkins*, required "more" according to the Ninth Circuit Court of Appeals in what appears to be a consistent, and *Amici* would argue inappropriate expansion of procedural due process requirements that make it virtually impossible for local government to ever get it right.[2] This expansionist philosophy is evident in *Perkins* and is contrary to sound constitutional principles of law.

---

[2] Interestingly, this case was heard by a jury on remand and the jury found in favor of the County. The landowner appealed and the Ninth Circuit reversed the jury verdict in an unpublished opinion. The County's petition for rehearing and rehearing En Banc is pending at the present time according to the office of the San Diego County Counsel. (*See*, Letter from County Counsel dated July 8, 1998, attached hereto as Appendix A).

A. The notice required by the court in *Perkins* goes well beyond established standards for notice of constitutionally protected rights.

The Ninth Circuit has unduly expanded the concept of constitutionally sufficient notice in *Perkins* by requiring that police officers give legal advice to the very individuals against whom such police officers act to seize property in connection with criminal investigations. The Court of Appeal stated that constitutionally adequate notice,

> " . . . must inform the recipient of the procedure for contesting the seizure or retention of the property taken, along with any additional information required for initiating that procedure in the appropriate court. In circumstances such as those presented by this record, the notice must include the search warrant number or, if it is not available or the record is sealed, the means of identifying the court file. It also must explain the need for a written motion or request to the court stating why the property should be returned." (Pet. App. A-22)

Much of this notice requirement appears to be reasonable, is currently the standard procedure followed by California cities, and in fact was complied with in *Perkins*. The language requiring information about the need for a written motion or request to the court, however, requires local governments to go beyond giving notice. It requires

them to provide legal "advice and guidance." Court procedures and requirements change and vary according to local rules. A requirement for written motion may be required in one jurisdiction and not in another. To meet the notice requirement in *Perkins*, public entities must be continually updated and apprised of such procedures and must take responsibility for adjusting the notice given as changes in court mandated procedures occur. Ordinarily, the responsibility for determining how to proceed rests with the individual and his or her legal advisor, not with local governmental officials.

Essentially, the question is whether the individual assumes responsibility for finding out what procedural rules apply, or whether governmental entities that do not set such rules must act *in parens patriae*. Historically, the court has rejected the notion that government must take on such paternal responsibilities. Justice Stevens argued against exactly this type of detailed notice in his dissent in *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978). He stated that a more detailed notice requirement "rests on a paternalistic predicate that I cannot accept." *Id.* at 26.

The facts of the *Perkins* case demonstrate the folly of attempting to make local government responsible for the proper assertion of individual rights. According to the California district court, "Perkins was told he needed a court order. He was told which court and judge to go to. It is not unreasonable to require him to submit some kind of written request in an attempt to test the adequacy of the procedure." (Pet. App. E-7) Additionally, the court found that Perkins did not make a concerted effort to get his property returned.

The court stated that he, " . . . made one trip to the Municipal Court, was advised that there was no file in his name and ceased any efforts to obtain an order returning his property. He filed nothing, he made no inquiry about the procedures . . . "(Pet. App. E-7). Thus, Perkins' deprivation of property did not arise because of constitutionally inadequate notice but because of his failure to initiate the judicial remedy available to him. Constitutionally adequate notice in this case does not require the detailing of legal procedure nor advice on how to initiate this procedure. The failure on the part of the plaintiff to make the effort to properly assert his rights simply does not justify placing a constitutional burden on local government and police departments to provide legal advice to individuals whose property has been seized pursuant to a search warrant.

B. The *Perkins* notice requirement imposes an unwarranted duty on municipal officers who do not have legal training to provide legal advice contrary to law and sound public policy.

The primary flaw in the reasoning of the court in *Perkins* is the assumption that reasonable notice requires public officials to explain judicial procedures to those seeking to obtain return of property legally seized in the course of police investigations. Explanation of such procedures, which are established by the courts and not by municipalities, counties or towns, puts local officials in the position of rendering legal advice to individuals who are inherently adverse to the governmental entity served by such officials.

Further, not only are untrained public employees required to give legal advice that could constitute the unauthorized practice of law, such employees are required to give advice that may be directly in conflict with the interests of the public entity which they are sworn to serve. The purported "notice" required by the court in *Perkins* goes far beyond standard notice requirements, and if allowed to stand, will place public employees in an untenable position.

1. Municipal officials are generally prohibited from giving legal advice because, in the usual case, they are not qualified to do so.

Municipal officials who are non-lawyers are prohibited from giving the legal advice required by *Perkins*. According to California Business and Professions Code section 6126(a) (Deering 1997), any person advertising or holding himself or herself out as practicing or entitled to practice law or otherwise practicing law who is not an active member of the State Bar, is guilty of a misdemeanor. The definition of the practice of law includes the giving of legal advice. For instance, in *People v. Merchants Protective Corp.*, 189 Cal. 531 (1922), the California Supreme Court held that a corporation comprised of non-lawyers could not, as its business, provide legal services to its members. These legal services included the giving of legal advice. According to the Court, " . . . under the laws of California, individuals may not, either singly or in association, engage in the practice of law without having a special license to do so." *Id.* at 533. Since *Perkins* requires municipal officials who are not lawyers to

engage in the practice of law, it also requires that these officials violate the law.

2. Police Officers are not usually licensed attorneys or otherwise qualified to give legal advice.

Not only are municipal officials prohibited from giving legal advice, most are unqualified to do so. For instance, police officers are not qualified to give legal advice. To become a police officer in California, an individual is not required to either be an attorney or have any legal education or training. California law specifies only minimal eligibility requirements for police officers. To become a police officer in California, an individual must: (1) be a citizen of the United States who is at least 18 years of age and of good moral character (CAL. GOV'T CODE § 1031 (Deering 1997)), (2) disclose any past criminal record he may have, (3) must be free of any physical, mental, or emotional condition which might adversely affect his exercise of the powers of a peace officer, and (4) have the equivalent of a high school diploma. Police officers are not required to be licensed attorneys and very few of them are.[3] Thus, the giving of legal advice is beyond the expertise of police officers.

---

[3] The *Perkins* decision also poses problems in the unusual situation where a police officer happens also the be a licensed attorney. Two sections of the California Government Code apply to peace officers who are also attorneys at the county level. One section of the code states that sheriffs, clerks, constables, or any of their deputies shall not practice law (CAL. GOV'T CODE § 24004). An exception to this rule exists for deputy sheriffs. A deputy sheriff may practice law if he gives legal advice to his employer that is within the course and scope of his employment

Even if all police officers were licensed attorneys, however, they would be prohibited from giving legal advice to the very individuals whose property they legally seize. By providing the advice and legal guidance required by *Perkins*, police officers would be legally assisting the same individuals they are collecting evidence against. Thus, the *Perkins* notice requirement creates an irreconcilable conflict of interest for police officers who are hired to serve a municipality but required to give legal advice to individuals to be used against their employer.

The ruling in *Perkins* contrasts dramatically with the care taken by the Supreme Court in crafting notice requirements in the case of *Miranda v. Arizona*, 384 U.S. 436 (1966). There, the Court carefully defined the contours of an individual's Fifth Amendment right not to incriminate himself when he is in police custody and

---

or if he represents an individual in civil matters with which the deputy sheriff does not have or will not have any association (CAL. GOV'T CODE § 24004.5).

If peace officers at the county level who are also attorneys are required to give legal advice to individuals whose property has been seized they will violate the California Government Code. Although deputy sheriffs may give legal advice in limited instances, they may not give legal advice to anyone who is not their employer. An individual whose property is seized pursuant to a search warrant is not a deputy sheriff's employer. Additionally, if the deputy sheriff seized the property or performed any act relating to the seizure of the individual's property, he is prohibited from giving legal advice to that individual. Thus, the *Perkins* notice requirement will force peace officers who are also attorneys to choose between violating either California's Government Code or judicially-created law.

required police officers to give only that information necessary to alert the individual to his rights. Specifically, the Court stated that, " . . . [a] person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney, either retained or appointed." *Id.* at 444.

The Court went on to delineate the entirely different role of an attorney for the accused which may include advising his client not to talk to the police until he has an opportunity to investigate the case, or remaining with his client during police questioning. The Court further stated that this role for the attorney, " . . . is not cause for considering the attorney a menace to law enforcement. He is merely carrying out what he is sworn to do under oath – protecting to the extent of his ability the rights of his client." *Id.* at 480. The Court's ruling in *Miranda* notes the distinction between the duty of a government official to give notice of fundamental rights and the duty of a licensed attorney to be an advocate for one charged with a crime. The attorney's duty to his client is to advise him of his rights and the possible consequences of his acts and the legal procedures available to him to avoid or minimize those consequences. The duty of a police officer is merely to give notice of the existence of specific fundamental rights and to assure that the government does not exceed its authority with regard to those rights.

Under *Miranda*, police are required only to inform a suspect of his Fifth Amendment rights against self-incrimination. This notice alerts the accused that protection of these rights may require the presence of an attorney. Officers are not required to tell suspects about the

legal remedies they may have, if their Fifth Amendment rights are violated. Nor does this notice require police officers to inform individuals as to how they may initiate proceedings against the police to challenge their actions if a constitutional deprivation occurs. If officers were forced to give suspects this legal guidance in such circumstances, they would be placed in the untenable position of legally assisting the same individuals they are collecting evidence against. The fundamental conflict of interest is patent.

Quite simply, police officers are not unbiased fiduciaries under the law – they are the enforcement arm of local government and when they act to enforce the law, they represent the public interest in an orderly society. When an officer lawfully seizes property subject to a warrant with probable cause that a crime has been committed, he is not impartial in his thinking or his actions. He has been convinced, and has convinced the judge issuing the warrant, that a crime has been committed and that it is necessary for him to act to protect the public. In the exercise of his duties, he must, of course, proceed fairly and equitably under the law to assure that the rights of the accused are protected. But, to require him to advise the very person whose property he has lawfully seized in the course and scope of his duty as a police officer on the legal procedures to challenge his action or to regain the seized property is absurd. The *Perkins* decision confuses the role of the police officer with the role of an attorney and by doing so creates a conflict of interest for these officers.

3. City Attorneys have the skill but not the legal authority to give advice for the benefit of individuals seeking to recover lawfully seized property.

In order to fulfill the *Perkins* notice requirement, it could be argued that municipal officials and police officers should consult with the city attorney and ask the city attorney to provide the required legal advice. In a municipality, the city attorney is the individual who advises city officials on all legal matters pertaining to city business (CAL. GOV'T CODE § 41801 (Deering 1997)). It is therefore not unusual for staff personnel to consult the city attorney to determine whether a particular course of action is legal.

This consultation is inappropriate, however, in cases where a municipal officer or staff member seeks advice from the city attorney to assist an individual who has violated a city ordinance or who is accused of a crime. A city attorney represents the city and may not assist in the defense of an individual who has violated any ordinance of the city he or she represents. This rule applies regardless of whether the city attorney has prosecutorial responsibilities on behalf of the city by which he is employed (CAL. GOV'T CODE § 41805). Additionally, if the city attorney has prosecutorial responsibilities, he may not defend or assist in the defense of persons accused of crimes. *People v. Rhodes*, 12 Cal. 3d 180, 187 (1974). This rule is a judicially-created rule of criminal procedure. *Id.* at 186.

These limits on a city attorney's authority to give legal advice, coupled with the *Perkins* notice requirement,

create a professional conflict of interest for city attorneys. It is axiomatic that most individuals whose property is the subject of a search warrant are criminal suspects. If a criminal suspect's property is seized pursuant to a search warrant and he is not home when the seizure occurs, *Perkins* requires that police officers provide notice of the seizure that contains legal advice and guidance as to the procedures to be followed to regain the property. If this is in written form, prepared by the city attorney, the city attorney has no control over who receives his written advice, but is fully responsible for the accuracy of it. If the advice is provided orally by the city attorney to the police officer on a case-by-case basis, the police officer, who is not an attorney but a third party, essentially waives the attorney-client privilege that would otherwise attach when he passes the advice along.

Further, if a police officer contacts the city attorney to obtain legal advice for a criminal suspect, and if the city attorney has prosecutorial responsibilities, the city attorney will violate a rule of criminal procedure if he provides this advice. If the city attorney refuses to provide this legal advice, he puts the police officer, an individual with no formal legal training, in the position of having to provide this advice or incur municipal liability.

4. City clerks frequently deal with the law, but are prohibited from giving legal advice.

In a municipality, many roles assumed by public employees involve dealing with the public in areas where legal issues arise. Because governmental officials are not trained legal advisors, statutory provisions have been

enacted strictly limiting public employees with regard to providing the public with legal advice as to how to proceed in various matters. City clerks, for example, are required to give information with regard to a wide variety of matters that involve legal consequences for individuals. For instance, election rules have serious consequences for individuals seeking public office. Nevertheless, it is well established that where any question arises as to legal procedures, city clerks decline to advise individuals on such matters because to do so would be to give legal advice, rather than just public notice.

City clerks are generally not qualified to give legal advice and are prohibited from doing so under the provisions of California Business and Professions Code section 6126(a) (Deering 1997). California law does not require that city clerks be attorneys nor have any legal education. Under general California law, city clerks are elected by city electors (CAL. GOV'T CODE § 36503 (Deering 1997)). To be elected as a city clerk, an individual may not be an elector of the city and must have resided in the electing city for the year preceding his election (CAL. GOV'T CODE § 36502). These eligibility requirements do not mandate that a city clerk have any legal education. Additionally, the California Legislature has prescribed the duties of city clerks in the Government Code.[4] The pertinent

---

[4] According to the Code, these duties are as follows: 1) City clerks maintain accurate records of the proceedings of the city's legislative body and board of equalization (CAL. GOV'T CODE § 40801); 2) City clerks act as accounting officers of the city and maintain records of the financial codes of the cities (CAL. GOV'T CODE § 40802); 3) City clerks summarize the city's financial report and publish it in a paper of general circulation or post the

sections of this code do not authorize city clerks to give legal advice even though they have duties that pertain to the judicial system and that have immediate legal consequences. City clerks, for example, maintain books with city ordinances and may take and certify affidavits and depositions. As part of their ministerial duties, city clerks determine whether referendum, initiative or recall petitions comply with the law. Based upon a city clerk's application of statutory requirements in such instances, ballot measures, and elected official incumbencies may be submitted to the voters or withheld from them. Despite the legal nature of these ministerial duties, city clerks are not empowered to either interpret or advise individuals as to available procedures or methods for challenging the city clerk's determination. That responsibility rests with the individual. After *Perkins*, in order to avoid municipal liability, city clerks may be placed in the unenviable

---

report in public places (CAL. GOV'T CODE § 40803); 4) City clerks keeps a book marked "ordinances" and record in it all city ordinances with his certification annexed to each, stating: (a) It is a true and correct copy of a city ordinance; (b) The ordinance number; and (c) It has been published or posted pursuant to law (CAL. GOV'T CODE § 40806); 5) City clerks are the ex officio assessors unless the legislative body provides for the assessment and collection of city taxes by county officers or otherwise (CAL. GOV'T CODE § 40810); 6) City clerks are custodians of the city seal (CAL. GOV'T CODE § 40811); 7) City clerks may have additional duties as prescribed by statute (CAL. GOV'T CODE § 40812); 8) City clerks may appoint deputies (CAL. GOV'T CODE § 40813); 9) City clerks and their deputies may administer oaths or affirmations and take and certify affidavits and depositions pertaining to city affairs and business which may be used in any court proceeding in the state (CAL. GOV'T CODE § 40814).

position of making ministerial determinations and then advising those affected as to how to challenge those determinations. In doing so, they may be required to go beyond the scope of their statutorily-defined duties and provide advice and guidance as to legal procedures and remedies outside their immediate knowledge and control.

5. Even clerks of the court, who have direct knowledge concerning court rules and proceedings, are prohibited from giving legal advice to individuals.

City clerks are less conversant with judicial procedure than clerks of court. Yet, even clerks of court are prohibited from interpreting judicial procedure or advising individuals how to proceed in a particular matter. Clerks of the court have no legal or judicial authority unless the constitution or legislature provides them with this authority. *See People v. Kuder*, 90 Cal. App. 594 (1928) (where the court stated, "It has uniformly been held that ordinarily the clerk of court is but a ministerial officer and is clothed with no judicial powers." *Id.* at 600). Generally, a clerk of court has no authority to hear evidence, to determine whether a demurrer or answer has been served on an attorney, to construe pleadings or rights thereunder, or to pass on whether an answer to a complaint is defective, irregular, or insufficient to constitute a defense. 12 CAL. JUR. 3D *Clerks of Court* § 1 (1972).

These prohibitions on a clerk's exercise of his or her authority indicate that clerks should not interpret legal procedure. If a clerk of court should not interpret legal procedure, it follows that a city clerk, who has less

knowledge about legal procedure than a clerk of court, should not give legal advice on this procedure. In fact, to assure that there is no confusion on the part of the public in this regard, courts in California routinely post signs at the clerk's station stating that the clerk is prohibited from giving legal advice.

II. *Memphis Light's* notice requirement applies to municipally-created and controlled dispute resolution procedures, not to judicial procedures.

In *Perkins*, the Ninth Circuit justified its new notice requirement on the basis of *Memphis Light, Gas, & Water Div. v. Craft*, 436 U.S. 1 (1978). In *Memphis Light*, the Supreme Court required a municipal utility company to provide information to its customers about its own internal dispute resolution procedures. These procedures were essentially created by the municipality since the utility company functioned under the ultimate control of the municipal government.[5] Thus, provision of notice to a customer which "inform[s] the customer not only of the possibility of termination but of a procedure for challenging a disputed bill," *Id.* at 12, does not require that a municipal utility company inform itself of dispute resolution procedures outside of its control or expertise.

[5] In *Memphis Light*, the Court indicated that, "Memphis Light, Gas and Water Division (MLG&W) is a division in the city of Memphis which provides utility service. It is directed by a Board of Commissioners appointed by the City Council, and is subject to the ultimate control of the municipal government." *Id.* at 1.

Conversely, the Ninth Circuit in *Perkins* used the Court's holding in *Memphis Light* to compel municipal agencies and police departments, to inform individuals about judicial remedies which they do not create and cannot control. Specifically, the Ninth Circuit required that the police provide notice that "inform[s] the recipient of the procedure for contesting the seizure or retention of the property taken, along with any additional information required for initiating that procedure in the appropriate court." (Pet. App. A-22). Unlike the municipal utility company in *Memphis Light*, neither the City of West Covina nor its police department created the judicial procedures available to aggrieved individuals in the *Perkins* case. These procedures are not dispute resolution procedures internal to the police department but judicially established local court procedures. These local-law procedures implement the remedies contained in the California Penal Code which were created by the state legislature, not the municipal government. Thus, no municipality has ultimate control over these procedures or remedies. Thus, the *Perkins* notice requirement goes well beyond Supreme Court's notice requirement in *Memphis Light*.

Not only does the *Perkins* notice requirement expand the concept of constitutionally adequate notice, it also expands it in a manner rejected by the Court in *Memphis Light*. In this case, the plaintiffs could have pursued their remedy either through the municipal utility company or the court system. Although the Court required that the municipal utility company provide information to the plaintiffs on their internal dispute resolution procedures, it did not require that the municipal utility company

provide information to the plaintiffs on judicial procedures or remedies.

The Court mentioned the availability of these judicial remedies, stating, "An aggrieved customer [of a municipal utility company] may be able to enjoin a wrongful threat to terminate, or to bring a subsequent action for damages or a refund. The availability of such local-law remedies is evidence of the State's recognition of a protected interest." *Memphis Light*, 436 U.S. at 11. The Court did not, however, require the municipal utility company to inform the aggrieved customer as to how it could proceed in court to obtain these legal remedies.

According to Justice Stevens' dissent, the Court wisely avoided requiring that municipal utility companies provide this type of "legal advice" to customers. *Id.* at 26. Thus, *Memphis Light* confirms that municipalities should not be required to give legal advice on judicial remedies. The Ninth Circuit ignored this determination when it asserted that constitutionally adequate notice requires a municipality to provide legal advice and guidance on judicial procedures and remedies.

III. The *Perkins* notice requirement unduly increases municipal liability.

The *Perkins* decision unduly and unjustly increases municipal liability and exposure to claims. Under *Perkins*, police departments will be required to provide legal advice to individuals whose property is seized pursuant to a search warrant in order to avoid liability under 42 U.S.C. § 1983. Civil rights litigants may use the *Perkins* decision as precedent to argue in other factual settings

that police action deprived them of a liberty or property interest and that the police's notice with regard to this deprivation did not contain the adequate legal advice. If police departments do not accurately predict the factual circumstances in which a plaintiff could successfully make this argument, municipalities will face greater liability.

Police departments are not the only public agencies affected by the *Perkins* decision. If this decision is interpreted broadly by the courts, all public agencies are potentially subject to this notice requirement if agency action deprives an individual of a constitutionally protected liberty or property interest. Thus, if these agencies fail to give an affected individual notice with adequate legal advice and guidance, they may be held liable under a 42 U.S.C. § 1983 action.

Where cities control the delivery of utility services, as in *Memphis Light*, the ruling in *Perkins* would now logically expand the notice requirement to include a requirement to give advice and guidance regarding judicial procedures and remedies available after exhaustion of all administrative remedies. Similarly, where any government provided benefit is subject to termination under local procedures designed to assure due process, a public agency could now be required to do more than give notice under its own rules. Thus, where utility tax exemptions are permitted by local ordinances for low and/or moderate income families, notice of the requirements and procedures for judicially challenging any termination of such an exemption under the local ordinance would need to be provided to avoid potential civil rights liability.

The list of circumstances where cities may be obligated to provide legal advice and guidance with regard to court procedures is extensive and prone to further expansion in the courts if the *Perkins* ruling is allowed to stand. Termination of trash hauling services, water and sewer services, home loan assistance programs all could trigger the expanded notice requirements of *Perkins*. Impoundment of vehicles for illegal parking or other violation of law could result in legal challenge based on failure to give adequate legal advice to assure return of the vehicle. Simply knowing when legal advice on judicial procedures and remedies should be given will pose a substantial burden on public agencies and expose them to substantial damages should they guess wrong.

The burden on local governments inherent in the *Perkins* expansion of due process notice requirements is substantial and unwarranted. To repeat the Ninth Circuit Court of Appeal's explicit ruling with regard to the adequacy of existing California requirements, "We agree with the California Supreme Court that [t]hese various remedies satisfy the requirements of due process." (Pet. App. A-17).

CONCLUSION

The ruling of the Ninth Circuit Court of Appeal in *Perkins* is ill-conceived and far too broad in its implications for local government and local police departments. Rather that establishing a simple *Miranda*-like notice requirement, the court has imposed a duty on local government and police officers to provide substantive legal

advice to the very individuals against whom governmental action has been taken. Further, the advice that must be given concerns procedures that are established, implemented and controlled by the courts, not by local governmental entities. Such procedures are subject to change without notice to local government employees or police officers, and simply being certain that the advice given under *Perkins* continues to be correct imposes a substantial burden on local government.

If change in the existing notice requirements is warranted, then it would be prudent to limit that change to a simple statement that any individual deprived of property pursuant to a legitimate search warrant has the right to contact an attorney for assistance in recovering such property. That limitation would be consistent with the requirements established in the *Miranda* case and would not require municipal employees to provide legal advice on court procedures outside their knowledge and control.

Requiring a local governmental agency to give advice and guidance to individuals with regard to court procedures available for the recovery of property poses an undue burden on local government. It further exposes taxpayer funded governmental entities, to unnecessary and unwarranted liability for their actions in attempting to comply with the requirements set forth in *Perkins*.

Accordingly, we respectfully request the Court to reverse the decision of the Court of Appeal.

Respectfully submitted,

BURKE, WILLIAMS & SORENSEN
JULIA HAYWARD BIGGS
RUFUS C. YOUNG, JR.

Attorneys for Amici Curiae

APPENDIX A

(SEAL)

County of San Diego
OFFICE OF COUNTY COUNSEL

COUNTY ADMINISTRATION CENTER
1600 PACIFIC HIGHWAY, ROOM 355
SAN DIEGO, CALIFORNIA 92101-2469
(619) 531-4860 FAX (619) 531-6005

[Names Omitted In Printing]

July 8, 1998

VIA FACSIMILE & U.S. MAIL

Julie Hayward Biggs, Esq.
Burke, Williams & Sorensen, LLP
611 West Sixth Street, Suite 2500
Los Angeles, California 90017

Dear Ms. Biggs:

Re: Amicus support for City of West Covina in West Covina v. Perkins, U.S. Supreme Court No. 97-1230

Your letter dated June 4, 1998, has just come to my attention. I am enclosing t' e County of San Diego's election to join in the amicus brief.

The published opinion in your case cited *Schneider v. County of San Diego*, 28 F.3d 89 (9th Cir. 1994), *cert.* denied 513 U.S. 1155 (1995), a case which I have been handling. After summary judgment for defendants was reversed, the case was tried to a jury, which rendered a full defense verdict. Recently the Ninth Circuit (in an unpublished

memorandum) reversed that verdict; the County's petition for rehearing and rehearing En Banc is pending at this time.

If you plan to cite or discuss *Schneider* in your brief, I would be happy to discuss the case in greater detail. The *Schneider* opinion is confusing, misleading and selectively omits material facts; for example, it fails to mention that multiple notices were sent to the registered vehicle owners warning that their vehicles would be destroyed. The opinion in your case describes *Schneider* as standing for the rule that "notice citing incorrect statute number violated due process," which was not the issue at all.

Your case is important. As in my *Schneider* case, an expansive interpretation of procedural due process notice is being used to unreasonably expand governmental liability. Please call on me if I can be of assistance.

Very truly yours,

JOHN J. SANSONE, County Counsel

By /s/ Morris G. Hill
MORRIS G. HILL, Deputy

MGH:lc
Encl.

APPENDIX B

LAW OFFICERS OF CITIES SUBMITTING BRIEF AMICI CURIAE

City of Alameda – Carol A. Korade, City Attorney

City of Anaheim – Jack L. White, City Attorney

City of Atherton – Robin D. Faisant, City Attorney

City of Barstow – Michael G. Colantuono, City Attorney

City of Benicia – Heather C. McLaughlin, City Attorney

City of Berkeley – Manuela Albuquerque, City Attorney

City of Brisbane – Harold J. Toppel, City Attorney

City of Burbank – Terry B. Stevenson, City Attorney

City of Carlsbad – Ronald R. Ball, City Attorney

City of Chino – Jimmy L. Gutierrez, City Attorney

City of Chula Vista – John M. Kaheny, City Attorney

City of Claremont – Sonia R. Carvalho, City Attorney

City of Coachella – Jimmy L. Gutierrez, City Attorney

City of Corcoran – Michael N. Nordstrom, City Attorney

City of Culver City – Carol A. Schwab, City Attorney

City of El Cajon – Lynn R. McDougal, City Attorney

City of Eureka – David E. Tranberg, City Attorney

City of Foster City – Kenneth M. Dickerson, City Attorney

City of Glendora – Gary Napper, City Manager

City of Gustine – Francis R. Ruggieri, City Attorney

City of Huntington Beach – Gail Hutton, City Attorney

City of Lafayette – Charles J. Williams, City Attorney

City of La Habra – Jerry Bankston, City Manager

City of Lake Forest – Gregory D. Diaz, City Attorney

City of Long Beach – John R. Calhoun, City Attorney

City of Los Alamitos – Thomas W. Allen, City Attorney

City of Manteca – Donald K. Lupul, Assistant City Attorney

City of Merced – Steven F. Nord, City Attorney

City of Modesto – Michael Milich, City Attorney

City of Napa – Thomas B. Brown, City Attorney

City of National City – George H. Eiser, III, City Attorney

City of Oakland – Jayne W. Williams, City Attorney

City of Palm Desert – David J. Erwin, City Attorney

City of Palm Springs – David J. Aleshire, City Attorney

City of Palos Verdes Estates – Stephanie R. Scher, City Attorney

City of Piedmont – George S. Peyton, Jr., City Attorney

City of Placerville – John W. Driscoll, City Attorney

City of Pleasanton – Michael H. Roush, City Attorney

City of Rialto – Robert A. Owen, City Attorney

City of Roseville – Mark Doane, City Attorney

City of San Buenaventura – Robert G. Boehm, City Attorney

City of San Bruno – Jonathan P. Lowell, City Attorney

City of San Diego – Leslie E. Devaney, Executive Assistant City Attorney

City of San Luis Obispo – Jeffrey G. Jorgensen, City Attorney

City of San Pablo – Brian M. Libow, City Attorney

City of San Rafael – Clark Guinan, Assistant City Attorney

City of Santa Clara – Michael R. Downey, City Attorney

City of Santa Paula – Phillip H. Romney, City Attorney

City of Signal Hill – David J. Aleshire, City Attorney

City of Stanton – Thomas W. Allen, City Attorney

City of Stockton – Cynthia Humbert Neely, City Attorney

City of Sunnyvale – Valeria J. Armento, City Attorney

City of Tehama – Rawlins Coffman, City Attorney

City of Tracy – Debra E. Corbett, City Attorney

City of Vernon – David B. Brearley, City Attorney

City of Westminster – Don Vestal, City Manager

City of West Sacramento – Carol Richardson, Assistant City Manager

City of Whittier – Thomas Mauk, City Manager

County of Calaveras – Spencer B. Batchelder, County Counsel

County of San Diego – Morris G. Hill, Deputy County Counsel

County of Tulare – Kathleen Bales-Lange, County Counsel

Town of Tiburon – Ann R. Danforth, Town Attorney

MOTION FILED
JUL 16 1998

No. 97-1230

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

CITY OF WEST COVINA,
Petitioner,
v.
LAWRENCE PERKINS; CLARA PERKINS;
APRIL PERKINS, a minor, by and through
LAWRENCE PERKINS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

CLIFFORD M. SLOAN
MICHAEL A. ROTKER
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

RICHARD RUDA *
Chief Counsel
STATE AND LOCAL LEGAL CENTER
444 N. Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850
* Counsel of Record for the *Amici Curiae*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

38 pp

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1230

CITY OF WEST COVINA,
Petitioner,

v.

LAWRENCE PERKINS; CLARA PERKINS;
APRIL PERKINS, a minor, by and through
LAWRENCE PERKINS,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

MOTION FOR LEAVE TO FILE BRIEF OF THE NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.3 of the Rules of this Court, *amici* respectfully move for leave to file the attached

brief *amicus curiae* in support of petitioner. Petitioner has consented to the filing of this brief. This motion is made necessary by the refusal of respondents to consent to this filing.

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States. *Amici* have a compelling interest in the issue presented in this case: the nature and extent of the due process obligation of state and local governments to advise citizens of post-deprivation remedies provided by state law.

Amici submit that the court of appeals erred in holding that the Due Process Clause of the Fourteenth Amendment requires state and local law enforcement officers executing a lawful search pursuant to a valid search warrant to furnish notice that "inform[s] the recipient of the procedure for contesting the seizure or retention of the property taken, along with any additional information required for initiating that procedure in the appropriate court" and "explain[s] the need for a written motion or request to the court stating why the property should be returned." Pet. App. A22. The court of appeals' holding is unprecedented, unreasonable, and opens the door to extensive governmental liability under 42 U.S.C. § 1983 as state and local officials, and the courts, struggle to determine the amount of notice regarding readily available state law post-deprivation remedies that must be provided in order to satisfy due process.

Because of the importance of these questions to *amici* and their members, *amici* respectfully request that this Court grant their motion for leave to file the accompanying brief *amicus curiae*.

Respectfully submitted,

CLIFFORD M. SLOAN
MICHAEL A. ROTKER
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

July 16, 1998

RICHARD RUDA *
Chief Counsel
STATE AND LOCAL LEGAL CENTER
444 N. Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850

* Counsel of Record for the *Amici Curiae*

QUESTION PRESENTED

Whether the court of appeals erred in holding that the Due Process Clause of the Fourteenth Amendment requires state and local law enforcement officers executing a lawful search pursuant to a valid warrant to furnish notice of the procedure for contesting the seizure, as well as information required for initiating the procedure in the appropriate court, and explaining the need for a written motion or request to the court seeking the return of the property.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
INTEREST OF THE *AMICI CURIAE*	1
STATEMENT	2
SUMMARY OF ARGUMENT	6
ARGUMENT	8
I. RESPONDENTS RECEIVED ACTUAL NOTICE AND THE POST-DEPRIVATION PROCESS PROVIDED BY STATE LAW IS CONSTITUTIONAL	8
II. THE NOTICE AND POST-DEPRIVATION OPPORTUNITY TO BE HEARD SATISFIED DUE PROCESS	10
A. The Due Process Clause Does Not Require Government Officials To Provide Notice Of, Or Advice Regarding, Post-Deprivation Remedies Available Under State Law	11
B. The Court Of Appeals' Analysis Contains Numerous Additional Errors That Warrant Reversal Of Its Judgment	16
1. The Court Of Appeals Failed To Appreciate The Significance Of The Fact That The Notice At Issue Related To A Post-Deprivation Opportunity To Be Heard	16
2. The Court Of Appeals Mistakenly Relied On Post-Notice Discussions Between Respondents And Government Officials To Support Its Holding That Notice Was Inadequate	20

TABLE OF CONTENTS—Continued

	Page
3. The Court of Appeals Improperly Promulgated Instructions Regarding The Content Of The Notice	22
4. The Court Of Appeals Incorrectly Applied *Mathews v. Eldridge* To A Due Process Challenge To The Content Of Notice	25
CONCLUSION	27

TABLE OF AUTHORITIES

Cases	Page
Aday v. Superior Court, 362 P.2d 47 (Cal. 1961)	3, 9
Anderson National Bank v. Luckett, 321 U.S. 233 (1944)	13
Armstrong v. Manzo, 380 U.S. 545 (1965)	10
Atkins v. Parker, 472 U.S. 115 (1985)	12, 12-13, 13, 15
Board of the County Commissioners of Bryan County, Oklahoma v. Brown, 117 S. Ct. 1382 (1997)	21
Bogan v. Scott-Harris, 118 S. Ct. 966 (1998)	23
Buker v. Superior Court, County of San Diego, 102 Cal. Rptr. 494 (Ct. App. 1972)	2
Cheek v. United States, 498 U.S. 192 (1991)	13
Coy v. County of Los Angeles, 1 Cal. Rptr. 2d 215 (Ct. App. 1991)	2, 3, 9
Crawford-El v. Britton, 118 S. Ct. 1584 (1998)	19
Daniels v. Williams, 474 U.S. 327 (1986)	17, 21
Dionne v. Bouley, 757 F.2d 1344 (1st Cir. 1985)	22-23
Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947)	13, 21
Gershenhorn v. Superior Court, Los Angeles County, 38 Cal. Rptr. 576 (Dist. Ct. App. 1964)	2
Gilbert v. Homar, 117 S. Ct. 1807 (1997)	9
Goss v. Lopez, 419 U.S. 565 (1975)	16, 17
Grannis v. Ordean, 234 U.S. 385 (1914)	16-17
Ingraham v. Wright, 430 U.S. 651 (1977)	17
Leatherman v. Tarrant County NICU, 507 U.S. 163 (1993)	21
Mathews v. Eldridge, 424 U.S. 319 (1976)	16, 25
McCahey v. L.P. Investors, 774 F.2d 543 (2d Cir. 1985)	23
Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1 (1978)	*passim*
Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983)	9
Minsky v. City of Los Angeles, 520 P.2d 726 (Cal. 1974)	3
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950)	*passim*

TABLE OF AUTHORITIES—Continued

	Page
North Laramie Land Co. v. Hoffman, 268 U.S. 276 (1925)	13
OPM v. Richmond, 496 U.S. 414 (1990)	21
Parratt v. Taylor, 451 U.S. 527 (1981)	15, 17
People v. Icenogle, 210 Cal. Rptr. 575 (Ct. App. 1985)	2
People v. Superior Court, Orange County, 104 Cal. Rptr. 876 (Ct. App. 1972)	2, 3, 9
Reetz v. Michigan, 188 U.S. 505 (1903)	13
Texaco, Inc. v. Short, 454 U.S. 516 (1982)	13
Tulsa Professional Collection Servs. v. Pope, 485 U.S. 478 (1988)	9
United States v. Stanley, 483 U.S. 669 (1987)	19

Statutes

42 U.S.C. § 1983	5
Ala. Code § 15-5-11	23
Alaska Stat. § 12.35.025(b)-(c)	23
Ariz. Rev. Stat. Ann. §§ 13-3919 to 13-3921	23, 24
Cal. Penal Code § 1536	2, 9, 11
Cal. Penal Code §§ 1523-1542	24
Cal. Penal Code §§ 1535-1540	23
Conn. Gen. Stat. Ann. § 54-33c(a)	23
D.C. Code Ann. § 23-524(c)(1)-(3)	23-24
Fla. Stat. Ann. § 933.11	24
Ga. Code Ann. § 27-306	24
725 Ill. Comp. Stat. Ann. 5/108-6	24
Ind. Code Ann. §§ 35-33-5-1 to 35-33-5-8	24
Iowa Code Ann. §§ 808.5 to 808.10	24
Iowa Code Ann. § 808.8(1)	24
Kan. Stat. Ann. § 22-2506	24
Mass. Gen. Laws Ann. ch. 276, §§ 3-7	24
Mich. Comp. Laws Ann. § 780.655	24
Minn. Stat. § 626.16	24
Mo. Ann. Stat. § 542.291(4)	24
Mont. Code Ann. § 46-5-227	24
Neb. Rev. Stat. Ann. § 29-815	24
N.H. Rev. Stat. Ann. § 595-A:5	24
N.Y. Crim. Proc. Law § 690.50(4)	24

TABLE OF AUTHORITIES—Continued

	Page
Nev. Rev. Stat. Ann. § 179.075(2)	24
N.C. Gen. Stat. § 15A-252	24
Ohio Rev. Code Ann. § 2933.241	24
Okla. Stat. Ann. tit. 22, §§ 1233-1234	24
Okla. Stat. Ann. tit. 22, §§ 1221-1241	24
Or. Rev. Stat. § 133.575(3)	24
S.C. Code Ann. § 17-13-140	24
S.D. Codified Laws § 23A-35-10	24
Tex. Crim. P. Code Ann. § 18.06(b)	24
Utah Code Ann. § 77-23-206	24
Va. Code Ann. § 19.2-57	24
W. Va. Code § 61-1A-4	24
Wis. Stat. Ann. § 968.17(1)	24
Wis. Stat. Ann. §§ 968.17 to 968.20	24

Rules

Fed. R. Crim. P. 41(d)	23
Ala. R. Crim. P. 3.11	23
Ark. R. Crim. P. 13.3(b)	23
Colo. R. Crim. P. 41(d)(5)(v)	23
Del. Super. Ct. R. Crim. P. 41(e)	24
D.C. Super. Ct. R. Crim. P. 41(e)(4)	24
Haw. R. Penal P. 41(d)	24
Idaho Crim. R. 41(d)	24
La. Code Crim. Proc. Ann. arts. 165-167	24
La. Code Crim. Proc. Ann. art. 166	24
Me. R. Crim. P. 41(d)	24
Md. R. Crim. Causes 4-601(c)	24
N.J. R. Crim. Prac. 3:5-5(a)	24
N.M. R. Crim. P.—Dist. Ct. 5-211(C)-(D)	24
N.D. R. Crim. P. 41(d)	24
Pa. R. Crim. P. 2008(a)-(b)	24
R.I. Super. Ct. R. Crim. P. 41(d)	24
Tenn. R. Crim. P. 41(d)	24
Vt. R. Crim. P. 41(d)	24
Wash. Super. Ct. Crim. R. 2.3(d)	24
Wyo. R. Crim. P. 41(d)	24

TABLE OF AUTHORITIES—Continued

Miscellaneous	Page
Oliver Wendell Holmes, *The Common Law* (1881)	13
Diana G. Motz & Andrew H. Baida, *The Due Process Rights of Postjudgment Debtors and Child Support Obligors*, 45 Md. L. Rev. 61 (1986)	23, 26
20 Cal. Jur. 3d (Rev.) *Criminal Law* § 2573 (1998)	2
4 B.E. Witkin & Norman L. Epstein, *California Criminal Law* § 2461 (2d ed. 1989)	2

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

No. 97-1230

CITY OF WEST COVINA,
Petitioner,
v.
LAWRENCE PERKINS; CLARA PERKINS; APRIL PERKINS, a minor, by and through LAWRENCE PERKINS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*

The interest of the *amici* is set forth in the motion accompanying this brief.[1]

[1] Pursuant to Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amici*, their members, or their counsel, made a monetary contribution to the preparation and submission of this brief.

STATEMENT

This case presents important questions about the duties and obligations of government and citizen.

1. California law provides extensive remedies for the recovery of seized property. One such remedy, referred to by the court of appeals, *see* Pet. App. A15-A16, is "a nonstatutory motion for release of property seized under a search warrant" pursuant to § 1536 of the California Penal Code. *People v. Superior Court, Orange County*, 104 Cal. Rptr. 876, 883 (Ct. App. 1972) (hereinafter *"Orange County"*); *see also People v. Icenogle*, 210 Cal. Rptr. 575, 577 (Ct. App. 1985). This "summary proceeding" is designed to allow the movant " 'to recover property which . . . is already in the hands of the court,' " and it specifically dispenses with " 'the expense and complications of bonds and other procedures.' " *Orange County*, 104 Cal. Rptr. at 883 (quoting *Gershenhorn v. Superior Court, Los Angeles County*, 38 Cal. Rptr. 576, 579 (Dist. Ct. App. 1964)); *see also Buker v. Superior Court, County of San Diego*, 102 Cal. Rptr. 494, 496 (Ct. App. 1972) (California courts have authority to restore property seized pursuant to a search warrant under both § 1536 and "the inherent power of the court to control and prevent the abuse of its process"); 4 B.E. Witkin & Norman L. Epstein, *California Criminal Law* § 2461, at 2930 (2d ed. 1989).[2]

[2] In addition to the summary proceeding provided by § 1536, California law provides that a person whose property has been seized pursuant to a search warrant may seek its recovery through a common law action for conversion. *See, e.g., Coy v. County of Los Angeles*, 1 Cal. Rptr. 2d 215, 221-22 (Ct. App. 1991); *People v. Superior Court, Orange County*, 104 Cal. Rptr. 876, 884 (Ct. App. 1972); *see also* 20 Cal. Jur. 3d (Rev.) *Criminal Law* § 2573 (1998) (surveying various civil remedies available to a person whose property has been seized pursuant to a search warrant). California law also provides that, upon denial by the court of a property owner's request for restoration of the property, "the party claiming the exhibit has available . . . [a] writ of mandate to determine whether the court was justified in refusing to return the exhibit to him." *Orange County*, 104 Cal. Rptr. at 884 (citations omitted).

Under California law, only the court has the authority to direct the return of property to the person from whom it has been seized.[3] " 'The seizing officer claims no right in or to the property, or in or to its possession, save and except as the court may find use for it. He must respond, as does any custodian, to the orders of the court for which he acted.' " *Orange County*, 104 Cal. Rptr. at 883 (quoting *Gershenhorn*, 38 Cal. Rptr. at 579); *Coy*, 1 Cal. Rptr. 2d at 222 (same); *see also* Pet. App. A16 (opinion of the court of appeals); Pet. App. E5 (opinion of the district court). The court of appeals expressly held that the post-deprivation procedures provided to respondents by California law for the recovery of the property seized pursuant to the warrant " 'satisfy the requirements of due process.' " Pet. App. A17 (quoting *Aday v. Superior Court*, 362 P.2d 47, 53-54 (Cal. 1961)).

2. West Covina police officers lawfully executed a valid search warrant at respondents' residence on May 21, 1993. Respondents were not present. Pet. App. E3. Pursuant to the warrant, the officers seized various items, including a twelve-gauge shotgun, a starter pistol, and cash. The officers left a " 'Search

[3] Seizure pursuant to a lawful warrant does not effect a final deprivation of property; the government is a bailee when it seizes property. *See, e.g., Coy*, 1 Cal. Rptr. 2d at 220; *Minsky v. City of Los Angeles*, 520 P.2d 726, 733 (Cal. 1974).

Warrant: Notice of Service' in [respondents'] home after the search and seizure." Pet. App. E2 (quoting Def. Exh. 2). This notice informed respondents of (1) the search, (2) the date of the search, (3) the particular property seized, (4) the fact that the search was undertaken pursuant to a warrant, (5) the name of the judge who had issued the warrant, (6) the court of the judge who had issued the warrant, (7) the date of the warrant, and (8) the names and telephone numbers of three police officers. Pet. App. A3-A5.

"Shortly after discovering his property missing, Perkins called [a West Covina detective] and inquired about how to get his property back. Another detective informed Perkins that he needed a court order." Pet. App. E3 (opinion of the district court) (citing Perkins Depo. 205:22-206:1). Mr. Perkins "was told what court and what judge to go to." *Id.* at E7; *see also* J.A. 123-24.

> Then, about a month after the search, Perkins went to the Citrus Municipal Court to try to get his property back. Perkins Depo. 206:5-208:2. He attempted to see Judge Oki, but was told that Oki was on vacation. He then attempted to get another judge to release his property, but was told the court had nothing under his name. Perkins did not submit any kind of written request, fill out any form, go back to the court on any other occasion, or make any other inquiries in any manner. *Id.*

Pet. App. at E3. The district court rejected, as unsupported "speculation," respondents' contention that the fact that Mr. Perkins did not have the search warrant number was fatal to his attempt to recover his property. *Id.* at E6.

3. Respondents filed this action under 42 U.S.C. § 1983 on November 19, 1993. J.A. 4. Petitioner's counsel informed respondents' counsel of the search warrant number as early as January 26, 1994, and no later than March 15, 1994. *Id.* at 70. Even after that date, however, respondents did not file a request with the court seeking restoration of their property, or otherwise invoke any of the remedies available to them under California law. *Id.* On March 1, 1994, the City filed in Los Angeles County Municipal Court a "Request and [Proposed] Order for Release of Property" concerning the property seized at respondents' residence on May 21, 1993. J.A. 33-35; Pet. App. E3. On June 24, 1994, as a result of the City's request, "Perkins received his property (except for a starter pistol which the police retained because it had been reported stolen)." *Id.*; Pet. App. A7.

Respondents' § 1983 complaint did not challenge the adequacy of the notice. Rather, they challenged the validity of the warrant and the seizure of the property. J.A. 9. Both issues were resolved against respondents, *see* Pet. App. A8-A17, and neither is at issue in this case. Following respondents' appeal, the court of appeals remanded the case "for clarification of the status of the bifurcated claim that West Covina violated due process by failing to provide adequate post-deprivation procedure for the recovery of seized property." *Id.* at D2. On remand, the district court held that both the notice and the State's return remedies were constitutionally adequate. *Id.* at E3-E7. Respondents appealed.

The court of appeals agreed that the State's return procedure is constitutionally sound. Pet. App. A13-A17. A divided panel, however, determined that the

notice was constitutionally deficient. The majority held that "[i]n cases where property is taken under California law," due process requires that local officials provide a written notice that contains two major components. Pet. App. A22. First, the notice must include certain information that was included on the notice left at respondents' residence (*i.e.*, the fact of the search, its date, the searching agency, the issuing judge, the judge's court, and persons to be contacted for additional information). *Id.* Second, the notice must include information regarding the return procedures available under state law—"the notice must inform the recipient of the procedure for contesting the seizure or retention of the property taken, along with any additional information required for initiating that procedure in the appropriate court"; it "must explain the need for a written motion or request to the court stating why the property should be returned"; and it must include "the search warrant number or, if it is not available or the record is sealed, the means of identifying the court file." *Id.*

SUMMARY OF ARGUMENT

The court of appeals' constitutional analysis is deeply flawed. As the dissenting judge below correctly observed, "[b]y imposing a duty on the police officers to advise [respondent Lawrence Perkins] on matters of state law, the opinion adds a due process requirement that has support neither in the case law nor in the Due Process Clause." Pet. App. A23-A24 (Leavy, J., concurring in part and dissenting in part). Judge Leavy further emphasized that "California law provides a means for [respondent Lawrence Perkins] to obtain return of his property," that due process does

not "require[] the City of West Covina to advise Perkins of his remedies," and that "[t]he Due Process Clause does not require the City of West Covina to provide legal advice to Perkins or any other person with a claim against the city." *Id.* at A25.

The panel majority's expansion of the constitutional parameters of notice to mandate the inclusion of publicly available information regarding post-deprivation remedies—the adequacy of which are not at issue—is unprecedented. No principle of law or logic requires a governmental entity to notify individuals of such readily accessible post-deprivation remedies. To the contrary, the majority's apparent belief that citizens are not capable of informing themselves about laws directly affecting their interests reflects a paternalistic view of the role of government that this Court repeatedly, and appropriately, has refused to indulge, absent extraordinary and compelling circumstances which are not present in this case.

The court of appeals' opinion, moreover, has profound adverse consequences for state and local governments. This novel ruling unjustifiably ties the hands of those governments by transforming matters of policy, with regard to which state and local governments should be free to differ, into constitutional imperative. Certainly, reasonable minds can disagree on the policy question whether search notices should include additional information about publicly available statutory remedies; equally certain, however, is that the Constitution does not *mandate* the inclusion of such information. Furthermore, the majority's decision sanctioning federal judicial re-formulation of local policy and micromanagement of municipal codes of conduct undermines stability and predictability

for these governmental entities by subjecting them to the likelihood of open-ended obligations under the Due Process Clause. Accordingly, the judgment of the court of appeals should be reversed.

ARGUMENT

The court of appeals' conclusion that the Due Process Clause requires notices to include readily accessible public information regarding statutory remedies is unprecedented and erroneous. The extensive written information left by the West Covina police officers and received by respondents plainly comported with established principles of constitutional notice. There is no basis for superimposing, as a matter of constitutional command, a requirement that notices include additional information regarding either post-deprivation remedies provided by state law or legal advice concerning the invocation of those state law remedies.

I. RESPONDENTS RECEIVED ACTUAL NOTICE AND THE POST-DEPRIVATION PROCESS PROVIDED BY STATE LAW IS CONSTITUTIONAL

The question before the Court is narrow, but important. It is helpful to frame this question by emphasizing three issues which, as the case comes to this Court, have been conclusively determined by the lower courts and thus are not at issue.

First, respondents do not challenge either the factual finding that they received actual written notice of the search of their residence and the seizure of their property, *see* Pet. App. A4-A5 (opinion of the court of appeals); *id.* at E2 (opinion of the district court), or the method by which they were so notified.

Compare Tulsa Professional Collection Servs. v. Pope, 485 U.S. 478, 479 (1988) (analyzing whether due process permits the use of constructive notice through publication); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 792 (1983) (same).

Second, the court of appeals held that the California statutes governing the return of property seized pursuant to a search warrant provide constitutionally sufficient post-deprivation process, and that holding is not at issue in this Court. *See* Pet. App. A17 ("We agree with the California Supreme Court that '[t]hese various [state law] remedies satisfy the requirements of due process.'") (quoting *Aday*, 362 P.2d at 54); Cal. Penal Code § 1536; *Coy*, 1 Cal. Rptr. 2d at 220 (describing California's state law remedies); *Orange County*, 104 Cal. Rptr. at 883 (same); *see also* pp. 2-3, *supra*.

Third, the court of appeals likewise held that due process did not require the State of California to provide *pre*-deprivation process, and that holding also is not at issue in this case. *See* Pet. App. A14 ("There is . . . no requirement of a prior hearing before a seizure of possessions under a search warrant."); *see also, e.g., Gilbert v. Homar*, 117 S. Ct. 1807, 1812 (1997) ("[W]e have rejected the proposition that [due process] *always* requires the State to provide a hearing prior to the initial deprivation of property.") (citation and internal quotations omitted).

Unlike many of the due process cases addressed by this Court, therefore, it is clear at this stage of the case that (1) respondents received actual written notice of the deprivation of property, (2) the post-deprivation procedures provided by California law are

constitutionally adequate, and (3) no pre-deprivation hearing was required. Thus, the only issue before the Court relates to the adequacy of the substantive *content* of the notice. As explained below, the content of the notice in question satisfied the requirements of due process.

II. THE NOTICE AND POST-DEPRIVATION OPPORTUNITY TO BE HEARD SATISFIED DUE PROCESS

The Due Process Clause of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV. Although "[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause," *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950), it is now beyond dispute that the "procedural" component of the due process clause requires the government to provide notice and an opportunity to be heard, at a meaningful time and in a meaningful manner, at some time before a deprivation of life, liberty, or property becomes final. *See, e.g., id.* at 314; *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

In this case, the governmental actions and policies provided constitutionally sufficient notice and opportunity to be heard. West Covina police provided respondents with contemporaneous notice of the deprivation of their property. The notice explained that a search warrant authorized the deprivation; provided the date, issuing judge, and court for the warrant; itemized the property seized; and listed names and telephone numbers of three police officers. Pet. App. A22. The publicly available return procedure, moreover, provided a constitutionally adequate opportunity to be

heard. *See* Cal. Penal Code § 1536; Pet. App. A17; *see also* pp. 2-3, *supra*.

Thus, the sole question presented in this case is whether the Constitution mandates that notices provided by state and local officials include additional information regarding accessible and publicly available remedies for the return of property lawfully seized pursuant to a valid search warrant. The answer, quite clearly, is no. Nothing in the Constitution, or this Court's decisions construing the parameters of notice — including *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978)—compels such a remarkable conclusion. Taken together, the written information left at respondents' home and the remedies for recovery of property provided by California law satisfy the touchstone of due process: notice and an opportunity to be heard.

A. The Due Process Clause Does Not Require Government Officials To Provide Notice Of, Or Advice Regarding, Post-Deprivation Remedies Available Under State Law

Government entities and officials are under no constitutional obligation to provide notice of otherwise available information regarding the post-deprivation remedies provided by state law.

Neither *Mullane* nor *Memphis Light* presented an issue concerning notice of the availability of state law post-deprivation remedies. In *Mullane*, the issue was whether interested parties were required to be advised of the pendency of a judicial settlement of trust accounts. *See* 339 U.S. at 309. The information at issue concerned the settlement of particular trusts, not the existence of publicly available laws (such as the trust

settlement statute itself) or the procedures established by such statutes. *Id.* at 309-10. Nothing in this Court's opinion implies an obligation to explain the existence of the publicly available statute governing these trust accounts, or the methods or procedures for invoking the statute.

Similarly, in *Memphis Light* the issue was whether ratepayers were required to be advised of the utility's own procedures for challenging disputed charges. *See* 436 U.S. at 13-14 (discussing notice regarding availability of "avenue of redress within the organization"). The decision did not involve a constitutional requirement that the utility provide customers with information about readily available statutory remedies. *See id.* at 15 (constitutional flaw with notice was the failure to provide advice regarding utility's own procedures). Indeed, Justice Stevens' dissent emphasizes that the Court did not require advice regarding publicly available legal remedies. *See id.* at 26 (Stevens, J., dissenting, joined by Burger, C.J., and Rehnquist, J.) ("[T]he Court wisely avoids holding that the customer must be given that sort of legal advice"—*i.e.*, "an explanation of the legal remedies that are available if a wrongful termination should occur" and of the possible "relief in court").

Further, a constitutional mandate requiring government officials to provide information about post-deprivation legal remedies would conflict with long-standing principles. "All citizens are presumptively charged with knowledge of the law," *Atkins v. Parker*, 472 U.S. 115, 130 (1985), and a doctrine of constitutional command rejecting this settled presumption would overturn well-established precedent. *See, e.g.*, *id.* at 131 ("The entire structure of our democratic

government rests on the premise that the individual citizen is capable of informing himself about the particular policies that affect his destiny."); *Texaco, Inc. v. Short*, 454 U.S. 516, 532-33 (1982) ("It is well established that persons owning property within a State are charged with knowledge of relevant statutory provisions affecting the control or disposition of such property."); *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947) ("[E]veryone is charged with knowledge of the United States Statutes at Large."); *Anderson Nat'l Bank v. Luckett*, 321 U.S. 233, 243 (1944) ("All persons having property located within a state and subject to its dominion must take note of its statutes affecting the control or disposition of such property and of the procedure which they set up for those purposes."); *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283 (1925) ("All persons are charged with knowledge of the provisions of statutes and must take note of the procedure adopted by them; and when that procedure is not unreasonable or arbitrary there are no constitutional limitations relieving them from conforming to it."); *see also, e.g., Reetz v. Michigan*, 188 U.S. 505, 509 (1903) ("When a statute fixes the time and place of meeting of any board or tribunal, no special notice to parties interested is required. The statute is itself sufficient notice."); Oliver Wendell Holmes, *The Common Law* 41 (1881) ("[E]very one is presumed to know the law.").[4]

---

[4] Although this presumption "[a]rguably" may be overcome in certain limited circumstances, *Atkins v. Parker*, 472 U.S. 115, 130 (1985); *cf. Cheek v. United States*, 498 U.S. 192, 199-200 (1991) (concluding, in a criminal tax evasion case, that the "common law presum[ption] that every person knew the law" did not apply because of the "complexity of the tax laws"), there is no basis in this case for

Furthermore, the open-ended notice obligations mandated by the court of appeals—that government must advise citizens of state law remedies that are presumptively known—are, as a practical matter, virtually impossible for state and local governments to implement. For example, a number of different legal remedies may be available to challenge notice of various government actions. Government officials should not be required, on pain of § 1983 liability, to canvass the law books and identify remedies that may or may not be applicable in a particular factual situation. Indeed, the court of appeals' ruling would require state and local officials to provide information regarding nonstatutory, common law, and equitable remedies as well. *See* pp. 2-3, *supra*. In addition, the court of appeals' decision would require government officials and, inevitably, the courts, to make difficult legal judgments about which remedies apply and under what circumstances, and to determine just how much notice regarding such readily available state law post-deprivation remedies must be provided in order to satisfy due process. The court of appeals' ruling thus would impose potentially limitless burdens on government entities.

Even more remarkably, the court of appeals also criticized the notice provided by petitioner because it did not include specific legal *advice* about the invocation and enforcement of those legal remedies. Pet. App. A22 ("[T]he notice must inform the recipient of the procedure for contesting the seizure or retention of the property taken, *along with any additional information required for initiating that procedure in the appropriate court*. . . . [The notice also] must ex-

---

rejecting the application of this time-honored principle. *See* pp. 3-5, *supra*.

plain the need for a written motion or request to the court stating why the property should be returned.") (emphasis added). Thus, state and local governments would be responsible for monitoring a host of remedies, and then providing legal advice regarding the invocation of those remedies. Once again, such a ruling is unreasonable, unprecedented, and imposes open-ended burdens on state and local governments.[5]

"The entire structure of our democratic government rests on the premise that the individual citizen is capable of informing himself about the particular policies that affect his destiny. To contend that [the notice at issue] was constitutionally insufficient is to reject that premise." *Atkins*, 472 U.S. at 131. The court of appeals' decision does precisely that—it rejects this basic democratic premise and assumes that respondents and all other citizens are incapable of

---

[5] As part of its requirement that the police provide notice of a "judicial remedy" and "some guidance for invoking that remedy," Pet. App. A18, the court of appeals also required a warrant number or other information concerning "the means of identifying the court file." *Id.* at A22. Just as the police have no constitutional obligation to provide information regarding procedures for invoking the return procedure generally, they have no constitutional obligation to provide notice regarding the court's file-keeping.

To the extent that respondents object to individual employees' failure to provide respondent Lawrence Perkins with information concerning the warrant, that objection is an inadequate basis for either a constitutional notice mandate or § 1983 liability. *See, e.g., Parratt v. Taylor*, 451 U.S. 527, 543-44 (1981); *see also* pp. 20-22, *infra*. Moreover, in ruling on the parties' cross-motions for summary judgment, the district court rejected respondents' contention that the fact that Mr. Perkins did not have the search warrant number was fatal to his attempt to recover his property. Pet. App. E6.

protecting their own interests. As a consequence of this sweeping new constitutional holding, moreover, governmental entities will face an increased risk of liability under § 1983, and state and local government officials will be deprived of much-needed flexibility in formulating appropriate policy. Nothing in the Due Process Clause or this Court's precedents compels these results.

B. The Court Of Appeals' Analysis Contains Numerous Additional Errors That Warrant Reversal Of Its Judgment

The court of appeals' analysis contains numerous additional errors that warrant reversal of its judgment: (1) the court failed to appreciate the significance of the fact that the notice at issue related to a *post*-deprivation opportunity to be heard; (2) the court mistakenly relied on post-notice discussions between respondents and government employees to invalidate the notice; (3) the court improperly promulgated instructions regarding the contents of notice; and (4) the court incorrectly applied the analytical framework of *Mathews v. Eldridge*, 424 U.S. 319 (1976), to a challenge to the substantive content of notice.

1. *The Court Of Appeals Failed To Appreciate The Significance Of The Fact That The Notice Related To A Post-Deprivation Opportunity To Be Heard*

The court of appeals' decision fails to appreciate the important difference between pre-deprivation and post-deprivation process. " 'The fundamental requisite of due process of law is the opportunity to be heard.' " *Goss v. Lopez*, 419 U.S. 565, 579 (1975) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394

(1914)). In the pre-deprivation context, notice ordinarily is individualized because the opportunity to challenge the proposed government conduct prior to the deprivation could not otherwise realistically be utilized. *Goss*, 419 U.S. at 581; *see also Memphis Light*, 436 U.S. at 14; *Mullane*, 339 U.S. at 314. This is not the case in the post-deprivation context, however, in which the existence of adequate and readily available state law remedies may be "sufficient to satisfy the requirements of due process." *Parratt v. Taylor*, 451 U.S. 527, 544 (1981), *overruled in part on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986); *see also, e.g., Ingraham v. Wright*, 430 U.S. 651, 672 (1977) (holding that "traditional common-law remedies are fully adequate to afford due process" in a case involving official conduct authorized by state law).

Mullane and *Memphis Light* are cases involving notice of a *pre*-deprivation opportunity to be heard—an opportunity that would not be meaningful without adequate notice before it occurred. This case, however, presents no issue regarding such a pre-deprivation opportunity, but rather, involves *post*-deprivation process (*i.e.*, the statutory return procedure for reclaiming lawfully seized property). Consequently, as Judge Leavy correctly observed, the majority of the court of appeals erred by relying on this Court's cases involving *pre*-deprivation notice. Pet. App. A24 (Leavy, J., concurring in part and dissenting in part).

Mullane involved an imminent judicial settlement of trust accounts. 339 U.S. at 309. If the parties did not receive notice reasonably calculated to reach them, they would be deprived of a meaningful opportunity to participate in the settlement. This Court empha-

sized that the notice at issue related to a pending proceeding, and the fact that parties who had not received adequate notice would be bound by such a proceeding. In the oft-quoted language of the decision, "[a]n elementary and fundamental requirement of due process *in any proceeding which is to be accorded finality* is notice reasonably calculated, under all the circumstances, to apprise interested parties of *the pendency of the action* and *afford them an opportunity to present their objections.*" *Mullane*, 339 U.S. at 314 (emphasis added). The case thus concerned an imminent event that threatened to have final consequences with regard to the disposition of property. *Mullane* thus did not involve notice regarding post-deprivation remedies.

Nor did *Memphis Light*. As in *Mullane*, the issue in *Memphis Light* was the opportunity to participate in an imminent proceeding. In *Memphis Light*, the pertinent imminent proceeding might avert a deprivation of continuous electric service—an opportunity that again would not be meaningful without adequate notice. *See* 436 U.S. at 14-15 (the pertinent "purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, *an impending 'hearing'*"; notice "in a case of this kind" must advise of "the availability of a procedure for protesting a *proposed* termination of utility service") (emphasis added). As emphasized by Justice Stevens' dissent, *Memphis Light* did not involve notice regarding post-deprivation remedies. *Id.* at 26; *see also* p. 12, *supra*.[6]

[6] Indeed, an important issue in *Memphis Light* was the adequacy of the pre-deprivation process that was available to avoid a wrongful termination of utility service. *See* 436 U.S. at 16-19; *see also* p. 26, *infra*.

Here, by contrast, the only process at issue is the State's constitutionally adequate, *post*-deprivation statutory return remedies for seizures of property that are not final. *See* p. — & n.3, *supra* (under California law, government is bailee of seized property). As Judge Leavy explained in dissent, *Mullane* principles have been "developed and applied in the context of *predeprivation* procedures." Pet. App. A24 (Leavy, J., concurring in part and dissenting in part). He further explained that those principles are "inapplicable where, as here, [respondent] Perkins' property was rightfully seized pursuant to a search warrant without need for a predeprivation proceeding"). *Id.*

In sum, the court of appeals' holding that the notice at issue here was unconstitutional is based on the inappropriate extension, to the post-deprivation context, of notice principles that were developed in cases involving pre-deprivation process.[7]

[7] In addition to its error in extending the pre-deprivation notice principles developed in *Mullane* and *Memphis Light* to the post-deprivation context, the court of appeals also overlooked the fact that *Memphis Light*'s analysis of the adequacy of the notice was grounded in "the particular circumstances of a threat to discontinue utility service." 436 U.S. at 15 n.15. Thus, the court of appeals erred in extending *Memphis Light* beyond the "particular circumstances" of that case without first considering whether its reasoning was applicable in other contexts. *See United States v. Stanley*, 483 U.S. 669, 680 (1987) ("[N]o holding can be broader than the facts before the court."); *see also Crawford-El v. Britton*, 118 S. Ct. 1584, 1592 (1998).

2. *The Court Of Appeals Mistakenly Relied On Post-Notice Discussions Between Respondents And Government Officials To Support Its Holding That Notice Was Inadequate*

Contrary to the court of appeals' reasoning, *see* Pet. App. A19-A20, communications between respondents and police *after* respondents had received the notice provide no support for expanding constitutionally-mandated notice requirements.

The court of appeals stated that respondent Lawrence Perkins received "confusing and inaccurate information" in oral conversations after the notice was provided. Pet. App. A20. Even assuming, *arguendo*, the accuracy of this characterization,[8] the fact that individual employees provide confusing or inaccurate information during post-notice conversations does not support a conclusion that the notice was unconstitutional. The court of appeals failed to appreciate the important distinction between the *notice* and the *remedy*. Any inaccurate information Perkins may have received relates—at most—to the adequacy of the post-deprivation *remedy*; such misinformation has no relevance to the logically distinct question regarding the adequacy of the *notice*.

In any event, misinformation negligently provided by municipal employees does not support a constitutional claim against the individual employee, or the governmental entity, for several reasons. First, individual acts of negligence do not amount to an actionable "deprivation" under the Due Process Clause. *See*,

[8] Among other reasons to question the court of appeals' characterization is the fact that the court apparently undertook to resolve a testimonial dispute. *See* Pet. App. A5 (noting testimonial conflict between Detective Ferrari and respondent Lawrence Perkins regarding accuracy of search warrant number that was provided).

e.g., *Daniels v. Williams*, 474 U.S. 327, 328 (1986) ("We conclude that the Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty, or property. . . . [M]ere lack of due care by a state official [does not] 'deprive' an individual of life, liberty, or property under the Fourteenth Amendment.").[9]

Second, the acts of negligence alleged here are a legally insufficient basis for imposing *municipal* liability under § 1983 because they do not establish a municipal "policy or custom." *See*, *e.g.*, *Leatherman v. Tarrant County NICU*, 507 U.S. 163, 166 (1993) ("[A] municipality can be sued under § 1983, but it cannot be held liable unless a municipal policy or custom caused the constitutional injury."); *see also Board of the County Comm'rs of Bryan County, Okla. v. Brown*, 117 S. Ct. 1382, 1387-88 (1997) (same). In addition, individual acts of negligence do not establish municipal liability under § 1983 because "a municipality may not be held liable under § 1983 solely because it employs a tortfeasor." *Bryan County*, 117 S. Ct. at 1388.[10]

[9] In addition to two conversations with a police detective, the court of appeals also described conversations with the issuing judge's chambers and with another judge. Pet. App. A5-A6. At a minimum, for the reasons stated, neither provides a basis for § 1983 liability.

[10] Analogously, absent "extreme circumstances," misinformation provided by government employees is not even a valid basis for estopping the government entity itself. *See*, *e.g.*, *OPM v. Richmond*, 496 U.S. 414, 420, 434 (1990) (declining to address whether estoppel may ever be asserted against the government, but noting that, at a minimum, "extreme circumstances" would be required to support a plea of estoppel); *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947)

Thus, even if the individual employees' post-notice statements amounted to negligence, such negligence would not provide a basis for imposing either individual or municipal liability under § 1983. More important, it is irrelevant to the question of the constitutional adequacy of the notice left at respondents' home by West Covina police officers, and it was improperly relied on by the court of appeals.

3. *The Court of Appeals Improperly Promulgated Instructions Regarding The Content Of The Notice*

The court of appeals erred in promulgating instructions regarding the content of notice and in micromanaging municipal codes of conduct. *See* Pet. App. A22. Although the court acknowledged that "detailed implementation" of the content of an adequate notice ought to be "left to the appropriate government agency," it ignored that principle and set forth extensive information that a notice "must" contain to be constitutionally sufficient. *Id.* In so doing, the court of appeals improperly intruded upon the autonomy of state and local executive and legislative functions.

Courts and commentators alike repeatedly have recognized that questions regarding the extent of notice generally are, and should be, questions of policy, not constitutional moment. *See, e.g., Dionne v. Bouley*, 757 F.2d 1344, 1354 (1st Cir. 1985) ("[T]he State is free to adopt such an elaborate [notice] requirement if it wants [but] we do not think the Constitu-

---

(declining to estop the government from denying crop insurance benefits to a farmer who was misinformed by a government agent as to the scope of the farmer's insurance coverage).

tion compels it."); *McCahey v. L.P. Investors*, 774 F.2d 543, 551 (2d Cir. 1985) ("[W]e find no support for the assertion that New York *must* provide such procedures as a requirement of due process.") (emphasis in original); Diana G. Motz & Andrew H. Baida, *The Due Process Rights of Postjudgment Debtors and Child Support Obligors*, 45 Md. L. Rev. 61, 70, 89 (1986) ("The failure of the notice required by various [state statutes] . . . to detail formally and laboriously the precise procedures by which a defense can be asserted, is constitutionally unimportant. . . . It is the task of the legislative branch of government to exercise its wisdom to create the form of notice most appropriate for a given situation.") (hereinafter Motz & Baida, *Due Process*).

The court of appeals' constitutional mandate that notices contain legal advice regarding post-deprivation remedies also deprives elected state and local officials—who are "closely responsible to the electorate," *Bogan v. Scott-Harris*, 118 S. Ct. 966, 972 (1998)—of policymaking authority. Indeed, it is telling that although virtually every State, the District of Columbia, and the Federal Government has adopted a procedure, by statute or court rule, governing search notices and return procedures, not a single statute or rule requires officers to provide notice of statutes or other legal remedies, or to provide legal advice regarding such remedies.[11] Moreover, while 36

---

[11] *See* Fed. R. Crim. P. 41(d); Ala. Code § 15-5-11 & Ala. R. Crim. P. 3.11; Alaska Stat. § 12.35.025(b)-(c); Ariz. Rev. Stat. Ann. §§ 13-3919 to 13-3921; Ark. R. Crim. P. 13.3(b); Cal. Penal Code §§ 1535-1540; Colo. R. Crim. P. 41(d)(5)(v); Conn. Gen. Stat. Ann. § 54-33c(a); D.C. Code Ann. § 23-

States and the Federal Government require police officers to provide a copy of the search warrant as part of the notice, twelve States have declined to impose such a requirement.[12] This diversity of views regarding the appropriate content of search notices highlights the fact that the issue is one on which States can, and do, differ. More fundamentally, such diversity on this policy matter does not necessitate constitutionalizing the policy judgment of 36 States, nor

524(c)(1)-(3) & D.C. Super. Ct. R. Crim. P. 41(e)(4); Del. Super. Ct. R. Crim. P. 41(e); Fla. Stat. Ann. § 933.11; Ga. Code Ann. § 27-306; Haw. R. Penal P. 41(d); Idaho Crim. R. 41(d); 725 Ill. Comp. Stat. Ann. 5/108-6; Ind. Code Ann. §§ 35-33-5-1 to 35-33-5-8; Iowa Code Ann. § 808.8(1); Kan. Stat. Ann. § 22-2506; La. Code Crim. Proc. Ann. art. 166; Me. R. Crim. P. 41(d); Md. R. Crim. Causes 4-601(c); Mass. Gen. Laws Ann. ch. 276, §§ 3-7; Mich. Comp. Laws Ann. § 780.655; Minn. Stat. § 626.16; Mo. Ann. Stat. § 542.291(4); Mont. Code Ann. § 46-5-227; Neb. Rev. Stat. Ann. § 29-815; Nev. Rev. Stat. Ann. § 179.075(2); N.H. Rev. Stat. Ann. § 595-A:5; N.J. R. Crim. Prac. 3:5-5(a); N.M. R. Crim. P. - Dist. Ct. 5-211(C)-(D); N.Y. Crim. Proc. Law § 690.50(4); N.C. Gen. Stat. § 15A-252; N.D. R. Crim. P. 41(d); Ohio Rev. Code Ann. § 2933.241; Okla. Stat. Ann. tit. 22, §§ 1233-1234; Or. Rev. Stat. § 133.575(3); Pa. R. Crim. P. 2008(a)-(b); R.I. Super. Ct. R. Crim. P. 41(d); S.C. Code Ann. § 17-13-140; S.D. Codified Laws § 23A-35-10; Tenn. R. Crim. P. 41(d); Tex. Crim. P. Code Ann. § 18.06(b); Utah Code Ann. § 77-23-206; Vt. R. Crim. P. 41(d); Va. Code Ann. § 19.2-57; Wash. Super. Ct. Crim. R. 2.3(d); W. Va. Code § 62-1A-4; Wis. Stat. Ann. § 968.17(1); Wyo. R. Crim. P. 41(d).

[12] *See* Ariz. Rev. Stat. Ann. §§ 13-3919 to 13-3921; Cal. Penal Code §§ 1523-1542; Del. Super. Ct. R. Crim. P. 41; Ind. Code Ann. §§ 35-33-5-1 to 35-33-5-8; Iowa Code Ann. §§ 808.5 to 808.10; La. Code Crim. Proc. Ann. arts. 165-167; Mass. Gen. Laws Ann. ch. 276, §§ 3-7; Okla. Stat. Ann. tit. 22, §§ 1221-1241; S.C. Code Ann. § 17-13-140; Utah Code Ann. §§ 77-23-206 to 77-23-210; Va. Code Ann. § 19.2-57; Wis. Stat. Ann. §§ 968.17-968.20.

does it require declaring unconstitutional the permissible policy judgment of twelve other States.

Finally, nothing limits the court of appeals' ruling to search notices of the type at issue in this case. Under its reasoning, the constitutional sufficiency of numerous other types of notices likely would be called into question. In an effort to avoid the inevitable barrage of legal challenges to these notices, state and local governments would be forced to re-assess the adequacy of countless versions of notices, and to consider inclusion of information regarding statutory and other post-deprivation remedies.[13]

In sum, the court of appeals' constitutional rule is erroneous, and unnecessarily intrudes on the policy-making authority of state and local governments.

4. *The Court Of Appeals Incorrectly Applied* Mathews v. Eldridge *To A Due Process Challenge To The Content Of Notice*

The court of appeals applied an erroneous legal standard to assess the adequacy of the content of the notice. It mistakenly extended the analytical framework of *Mathews v. Eldridge*, 424 U.S. 319 (1976), to a due process challenge to the content of a notice.

Mathews was not a notice case. Rather, it involved a question over the timing and extent of the opportunity to be heard. 424 U.S. at 332-33. The court of appeals cited no authority for its extension of *Mathews* to challenges based on the content of the notice—and

[13] For example, under the court of appeals' reasoning, States would arguably have a constitutional obligation to provide detailed legal advice to taxpayers concerning available post-deprivation remedies.

indeed, this Court has never applied *Mathews* in this setting.

To the contrary, *Memphis Light* confirms that *Mathews* does not provide the appropriate standard for assessing the adequacy of the content of notice. *Memphis Light* involved two separate issues, one relating to the adequacy of the notice and one relating to the adequacy of the opportunity to be heard. This Court applied the *Mullane* standard to assess the adequacy of the content of the notice. 436 U.S. at 13-14. In addressing the separate question of the timing and adequacy of the opportunity to be heard, the Court applied the *Mathews* framework. *Id.* at 15-17. Thus, the Court's separate treatment of the notice and process issues in *Memphis Light* confirms that *Mathews* does not apply to challenges based on the content of a notice. *See, e.g.*, Motz & Baida, *Due Process*, 45 Md. L. Rev. at 69 (observing that *Mathews* applies "only to determine when and what sort of a hearing must be provided," and that no post-*Mathews* decision "articulate[s] any application of the *Mathews* factors to determine the type of notice that is constitutionally adequate").

The appropriate due process inquiry is whether there is adequate notice and an opportunity to be heard. The *Mathews* framework applies to the adequacy of the latter, not to the former. The content of the notice left by the West Covina police department at respondent Lawrence Perkins' residence satisfied these basic requirements. No further notice regarding available post-deprivation remedies was constitutionally required.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

CLIFFORD M. SLOAN
MICHAEL A. ROTKER
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

RICHARD RUDA *
Chief Counsel
STATE AND LOCAL LEGAL CENTER
444 N. Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850

* Counsel of Record for the *Amici Curiae*

July 16, 1998

Supreme Court, U.S.
FILED
JUL 16 1998
OFFICE OF THE CLERK

(8)

No. 97-1230

In The Supreme Court of the United States
October Term, 1997

CITY OF WEST COVINA,

Petitioner,

v.

LAWRENCE PERKINS, et al.

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

BRIEF *AMICI CURIAE* OF OHIO, ALABAMA, ALASKA, ARIZONA, ARKANSAS, DELAWARE, FLORIDA, HAWAII, INDIANA, IOWA, KANSAS, LOUISIANA, MARYLAND, MICHIGAN, MINNESOTA, MONTANA, NEBRASKA, NEVADA, NEW JERSEY, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, OREGON, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, WASHINGTON, COMMONWEALTH OF VIRGINIA AND TERRITORY OF GUAM IN SUPPORT OF PETITIONER

BETTY D. MONTGOMERY
Attorney General of Ohio
JEFFREY S. SUTTON
State Solicitor
Counsel of Record
ELISE W. PORTER
JEFFREY B. HARTRANFT
Assistant Attorneys General
30 East Broad St., 17th Floor
Columbus, Ohio 43215
(614) 466-8980

Counsel for *Amici* States

BILL PRYOR
Attorney General
State of Alabama

BRUCE M. BOTELHO
Attorney General
State of Alaska

GRANT WOODS
Attorney General
State of Arizona

WINSTON BRYANT
Attorney General
State of Arkansas

M. JANE BRADY
Attorney General
State of Delaware

ROBERT A. BUTTERWORTH
Attorney General
State of Florida

GUS F. DIAZ
Attorney General
Territory of Guam

MARGERY S. BRONSTER
Attorney General
State of Hawaii

JEFFREY A. MODISETT
Attorney General
State of Indiana

THOMAS J. MILLER
Attorney General
State of Iowa

CARLA J. STOVALL
Attorney General
State of Kansas

RICHARD P. IEYOUB
Attorney General
State of Louisiana

J. JOSEPH CURRAN, JR.
Attorney General
State of Maryland

FRANK J. KELLEY
Attorney General
State of Michigan

HUBERT G. HUMPRHEY III
Attorney General
State of Minnesota

JOSEPH P. MAZUREK
Attorney General
State of Montana

DON STENBERG
Attorney General
State of Nebraska

FRANKIE SUE DEL PAPA
Attorney General
State of Nevada

PETER VERNIERO
Attorney General
State of New Jersey

DENNIS C. VACCO
Attorney General
State of New York

MICHAEL F. EASLEY
Attorney General
State of North Carolina

HEIDI HEITKAMP
Attorney General
State of North Dakota

W.A. DREW EDMONDSON
Attorney General
State of Oklahoma

HARDY MYERS
Attorney General
State of Oregon

CHARLES M. CONDON
Attorney General
State of South Carolina

MARK W. BARNETT
Attorney General
State of South Dakota

JAN GRAHAM
Attorney General
State of Utah

MARK L. EARLEY
Attorney General
Commonwealth of Virginia

CHRISTINE O. GREGOIRE
Attorney General
State of Washington

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICI	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. The City's "Notice Of Service" Form Satisfies Due Process	5
II. Memphis Light Supports Rather Than Undermines This Analysis	8
III. Individuals Must Assert Their Procedural Rights Under State Law Before Filing A Due Process Claim	12
CONCLUSION	14
APPENDIX	A-1

TABLE OF AUTHORITIES

Cases	Page
American Land Co. v. Zeiss, 219 U.S. 47 (1911)	6
Atkins v. Parker, 472 U.S. 115 (1985)	3,10
Bell v. Burson, 402 U.S. 535 (1971)	9
Federal Crop Ins. v. Merrill, 332 U.S. 380 (1947)	10
Fuentes v. Shevin, 407 U.S. 67 (1972)	9
Mathews v. Eldridge, 424 U.S. 319 (1976)	5,6
Memphis Light, Gas and Water Division et al. v. Craft, 436 U.S. 1 (1978)	passim
Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950)	passim
North Laramie Land Co. v. Hoffman, 268 U.S. 276 (1925)	11
Parratt v. Taylor, 451 U.S. 527 (1981)	passim
Paul v. Davis, 424 U.S. 693 (1976)	11
Perkins v. City of West Covina, 113 F.3d 1004 (9th Cir. 1997)	7
Sandin v. Connor, 515 U.S. 472,132 L.E.2d 418 (1995)	12
Texaco, Inc. v. Short, 454 U.S. 516 (1982)	3,10
Walker v. Birmingham, 388 U.S. 307 (1967)	12

Statutory Provisions **Page**

J. Swan & L. Critchfield, I Revised Statutes of Ohio 815 (1860) 11

Constitutional Provisions

U.S. Const. Amd. XIV 4

INTEREST OF THE AMICI

Amicus curiae State of Ohio and 29 other amici States and Territories write to support the City of West Covina in urging the Court to reverse the decision below. At stake are the due process requirements that States and their political subdivisions must follow in notifying their citizens how to retrieve property that has been seized in accordance with the terms of a lawfully-issued search warrant.

The issue has widespread application. In enforcing their criminal laws, the amici States, like many of their political subdivisions, frequently must return property that has been seized in the course of criminal investigations. Most States also regulate this matter by statute, with many relying on State laws that have been in place for some time. *See* Appendix. And many State highway patrols assume direct responsibility for ensuring that property seized during the course of an investigation is eventually returned.

The Ninth Circuit's decision creates doubt in an area of the law that once had certainty. Even though the police in this instance provided the property owners with the following information about the search -- the date of the search, the police department that conducted the search, the name of the court (and judge) that issued the search warrant, a list of the property seized, and the telephone number of the three officers involved in the case -- the lower court held that due process requires more. The amici States, to be sure, share the Ninth Circuit's animating concern that citizens have access to adequate procedures for obtaining the return of property. But we respectfully submit that the court's attempt to address that concern sidestepped the teachings of precedent, cast a shadow over long-accepted State laws and law-enforcement practices, and ultimately disserved the very goals it sought to advance. For these reasons and those elaborated below, we submit this amici curiae brief for the Court's consideration.

SUMMARY OF ARGUMENT

The City of West Covina satisfied the requirements of due process in this instance. Upon seizing respondents' property in the course of a criminal investigation, due process required the city to provide notice "reasonably calculated" to inform the residents where the property was and how to get it back. *Mullane v. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). That is just what the city did.

After executing a warrant to search respondents' house and after seizing several items of property in accordance with that warrant (including the $2,469 in cash and starter pistol at issue here), the police officers left a form at the house entitled "Search Warrant: Notice of Service." The form supplied the residents with the following information: the date of the search, the police department that conducted the search, a list of the property seized, the court (and judge) that issued the search warrant and had authority to return the property, and the name and telephone number of the three police officers involved in the search. By any measure of reasonable notice, this form sufficed. It supplied the residents with all the information they needed to retrieve their property while at the same time protecting the city's interest, to say nothing of the residents' interest, in ensuring that such property is returned only to its rightful owners and only after an appropriate court order authorizing its release.

The lower court erred in requiring more, namely a recitation of the number of the warrant governing the search and a recitation of the State laws allowing citizens to protest the seizure of property and obtain its return. Because no tenable showing has been made that the number of the search warrant was needed to retrieve the property, its absence simply did not transform the abundant information that was supplied into inadequate notice. The city likewise did not have an obligation to cite all State laws governing such matters for the same reason

that it need not cite the Fourth Amendment of the United States Constitution every time it notifies individuals that their residence has been searched. The point of notice is not to fuel litigation or to supply legal advice regarding the law governing seizures of property and their return during a criminal investigation. It rather is to identify the basic information each citizen needs to get his or her property back. West Covina did just that, and accordingly gave all the notice that was owed.

Nor do *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978), and the other cases relied on by the Ninth Circuit lead to a contrary conclusion. Those decisions concern the right of citizens to protest the extinguishment of a property interest -- in *Memphis Light*, the termination of a basic utility service -- *before* it occurs. But in that unique setting, the case law aptly recognizes that a pre-deprivation opportunity to protest government action must be bundled with a right to notice of how and where to make that challenge. Here, in conspicuous contrast, the deprivation has already occurred. And on this record no further risk of intentional deprivation exists, whether by way of further transfer of the property, its complete destruction or its escheat to the State. The only question under these circumstances is how to get the property back. The notice supplied by the city amply served that task -- above all by disclosing the names of the court, judge and police officers with access to and custody over the property, together with the authority to see to its return. Notice of all laws governing such challenges not only exceeds the requirements of due process but also overlooks the time-honored requirement that "[a]ll citizens are presumptively charged with knowledge of the law." *Atkins v. Parker*, 472 U.S. 115, 130 (1985). *See Texaco, Inc. v. Short*, 454 U.S. 516, 532-33 (1982). The lower court's contrary conclusion should be reversed.

ARGUMENT

In meeting their duty not to "deprive any person of life, liberty or property, without due process of law," U.S. Const. Amd. XIV, the States and their political subdivisions have long taken it upon themselves to notify citizens how to protest deprivations of property before they occur and how to retrieve property after it has been taken. Common ground exists on several fronts regarding the contours of that duty here.

All agree that the city in this instance had no duty to notify respondents about the seizure of their property *prior* to the search. Either the "necessity of quick action by the State" in executing a search warrant "or the impracticality of providing any meaningful predeprivation process" in such situations amply "satisfies the requirements of procedural due process." *Parratt v. Taylor*, 451 U.S. 527, 539 (1981). The rigorous requirements for obtaining a search warrant thus provide all the process that is constitutionally due before the police execute a validly-issued search warrant.

All further agree that the city had an obligaton to provide notice of the search and seizure in order to give the owners an opportunity to get their property back. And all finally agree that the notice must have been "reasonably calculated" to apprise the residents where the property was and whom to contact about its return. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

What divides the litigants is whether the notice the city gave the property owners was in fact adequate. In holding that the notice failed to meet the minimim requirements of due process, the lower court made two essential mistakes. It misconstrued *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1 (1978), which undermines rather than advances the Ninth Circuit's analysis. And it mistakenly equated the notice

requirements concerning a pre-deprivation hearing with those of a post-deprivation procedure. The decision should be reversed in its entirety.

I. The City's "Notice Of Service" Form Satisfies Due Process.

In advocating the type of notice that due process requires in this case, the amici States do not write on a blank slate. Two precedents, one general and one more specific, supply an agreed-upon framework for analyzing this issue. In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Court generally concluded that the requirements of procedural due process require consideration of three different factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 334-35.

In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, the Court offered more specific guidance regarding the application of this balancing of individual-property-interest/risk-of-deprivation/government-interest in the context of notice. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality," the Court stated, "is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford

them an opportunity to present their objections." *Id.* at 314. At the same time, while the notice "must be of such nature as reasonably to convey the required information" to affected individuals, it must have "due regard for the practicalities and pecularities of the case." *Id.* at 314-15. The test thus "'is not the possibility of conceivable injury'" of any one individual "'but the just and reasonable character of the requirements, having reference to the subject with which the statute deals.'" *Id.* at 315 (quoting *American Land Co. v. Zeiss*, 219 U.S. 47, 67 (1911)).

Whether one applies the *Mathews v. Eldridge* balancing test or the *Mullane* reasonable-notice test, the City of West Covina clearly passes. Under both inquiries, which ultimately require the same common-sense weighing of private and public interests, the city adequately notified respondents what had happened to their starter pistol and $2,469 in cash, who had custody of the property, and whom to contact about its return.

After conducting a search of respondents' house, the police left a form entitled "Search Warrant: Notice of Service." It conveyed the following information to the respondents about the search and seizure of their property:

> To Whom it May Concern:
>
> 1. These premises have been searched by peace officers of the West Covina Police Department pursuant to a search warrant issued on 5-20-93, by the Honorable Dan Oki, judge of the Municipal Court, Citrus Judicial District.
>
> 2. The search was conducted on 5-21-93. A list of the property seized pursuant to the search warrant is attached.

> 3. If you wish further information, you may contact: Det. Ferrari or Det. Melnyk at [the telephone number].

In addition to this information and an attached list of property seized during execution of the warrant, the form also disclosed the name of another officer with information about the search warrant, Lt. Schimanski, as well as that officer's telephone number. *Perkins v. City of West Covina*, 113 F.3d 1004, 1007 (9th Cir. 1997).

All told, the "Notice of Service" disclosed abundant information about the underlying search. It conveyed the date of the search, the police department that conducted the search, the names and telephone numbers of each of the three officers involved in the search, a complete list of the property seized, and the name of the court (and judge) that issued the search warrant and had authority to permit the property's return.

This information satisfied the city's due process duties. The form told respondents what had happened to their property, who had it, and whom to contact about getting it back. Above all else, the "Notice of Service" told them the court that had issued the warrant and had statutory authority to release the property. Armed with this information, respondents knew everything they needed to know to ensure that their property was ultimately returned. That it takes time to retrieve such property and that respondents were unsuccessful in initially getting it back does not undermine the process provided or the reasonableness of the notice given. To the contrary, it speaks well of West Covina in general and the State of California in particular that they do not permit easy releases of property seized in a search, in order to ensure that the property is returned only to its rightful owners and to ensure that the property is no longer needed in the criminal investigation. On this record, the city plainly provided notice "reasonably calculated" to its task.

II. *Memphis Light* Supports Rather Than Undermines This Analysis.

Far from changing matters, *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, supports this analysis and this result. *Memphis Light* arose from a civil dispute about the termination of utility services and concerned the nature of the notice that must precede a utility's decision to halt these essential services. In holding that the termination notices must inform customers of the procedure for protesting a termination, the Court said the following:

> The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending "hearing." Notice in a case of this kind does not comport with constitutional requirements when it does not advise the customer of the availability of a procedure for protesting a proposed termination of utility service.

Id. at 15.

Relying on this language, the lower court concluded that *Memphis Light* required West Covina to notify respondents about all State laws "for protesting the seizure of [their] property" and "the existence of a formal judicial procedure for obtaining return" of the property. 113 F.3d at 1012. This misreads *Memphis Light* in two critical respects.

To begin with, the notice supplied by West Covina does in fact meet the notice requirements of *Memphis Light*. There, the Court made clear that the adequacy of notice concerns "[f]undamental fairness, not simply considerations of courteous treatment of customers." 436 U.S. at 16 n.19 (quotation

omitted). It thus requires government only to provide "notice and the actual provision of a timely opportunity to meet with designated personnel who are duly authorized to review" the individual's concerns. *Id.* Because West Covina's notice told respondents who had the property and the names of the government officials who could obtain its return, the notice met the very requirements of *Memphis Light* on which the lower court relied.

True or not, the lower court made another error. It incorrectly equated the requirements of pre-deprivation notice with those of post-deprivation notice. The two procedures are different in purpose and different in kind. In the one setting, where the deprivation has immediate and important effects on a person's life or livelihood, the Court in a series of cases has required notice of the hearing before any deprivation occurs. *See, e.g., Mullane*, 399 U.S. 306 (personal notice to beneficiaries of a trust to be judicially settled necessary when whereabouts of beneficiaries known); *Bell v. Burson*, 402 U.S. 535 (1971) (driver's license under certain circumstances may not be suspended without a hearing); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (hearing required before State may seize property in debtor's possession). In each of these cases, "deprivations of property were authorized by an established state procedure and due process was held to require predeprivation notice and hearing in order to serve as a check on the possibility that a wrongful deprivation would occur." *Parratt*, 451 at 538.

Memphis Light falls within this category of cases, and is controlled by them. It involved a procedure for discontinuing a vital utility service, and it was therefore entirely appropriate to require meaningful notice for resolving bill disputes -- a procedure provided not by State law but by the utility itself, 436 U.S. at 13-14 -- before the termination occurred.

As *Parratt v. Taylor* recognizes, however, remedies for retrieving property after it has been taken are different. 451 U.S. at 539. There is no pending hearing date, there is no need for immediate preparation for the hearing, and there is no risk of irreversible termination of the property interest. Without notice of the procedure for challenging a threatened utility termination in *Memphis Light*, these essential services could have been cut off. A similar problem informed *Mullane*, where trust beneficiaries could forever have lost their interest in the trust without notice of a pending settlement of accounts under State law.

But the same dilemma does not exist in a post-deprivation setting. The rigorous requirements for obtaining a search warrant supply ample pre-deprivation protection for criminal suspects and their housemates alike. And once the property has lawfully been taken, the relevant objective is to supply sufficient information not for a hearing but to direct the individual where to go to retrieve the property. Here, that was done, and nothing in this record indicates that the name of the court and judge with custody over the property would be -- or in fact was -- insufficient to obtain return of the property.

Under these circumstances, no further notice of State-law hearings, procedures or any other information was constitutionally required. Just as State and local governments need not tell citizens about the requirements of the Fourth Amendment every time they complete a search and seizure, they need not identify each and every provision of State law regarding such seizures. The reason is straightforward: Citizens are "presumptively charged with knowledge of the law." *Atkins v. Parker*, 472 U.S. 115, 130 (1985). *See Federal Crop Ins. v. Merrill*, 332 U.S. 380, 384 (1947) ("everyone is charged with knowledge of the United States Statutes at Large").

Confirming the point is *Texaco, Inc. v. Short*, 454 U.S. 516 (1982), which applied this venerable principle to circumstances far more trying to individual property interests than this one. At stake in *Short* was the validity of a State law extinguishing mineral interests after 20 years unless the owner filed a statement of claim. Even though the State did not directly notify the property owner about this provision, even though the individual did not in fact know about its existence and even though the individual's property interest ultimately lapsed under the law, the Court held that the law did not violate the notice requirements of due process. "Generally, a legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply." *Id.* at 532. A similar conclusion applies here. Respondents had at their disposal a law that would have afforded them all the relief they sought. Their ignorance of that law, like ignorance of the law generally, does not make out a constitutional case. *See North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283 (1925) ("All persons are charged with knowledge of the provisions of statutes and must take note of the procedure adopted by them; and when the procedure is not unreasonable or arbitrary there are no constitutional limitations relieving them from conforming to it").

By trying to engraft additional procedural requirements on the retrieval of seized property, moreover, the lower court threatens to "make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul v. Davis*, 424 U.S. 693, 701 (1976); *Parratt*, 451 U.S. at 544. Many States have well-established procedures for return of property seized in a search, *see* Appendix, with some predating passage of the Fourteenth Amendment, *see, e.g.*, J. Swan & L. Critchfield, I Revised Statutes of Ohio, 815 (1860). The State laws fall into two general categories -- those in which the seized property can be returned only by an order of court, and those in which there are

mechanisms other than a court order for the release, usually by application to the police or prosecutor. A sudden gloss on due process that requires notice of every such procedure, whether provided by State or local law, threatens to place State and local governments in the difficult if not impossible position of having to catalog each of these laws.

Worse yet, the lower court's decision punishes State and local governments for enacting these well-meaning laws in the first instance. It thus "discourages" the "desirable development" of enacting laws to govern these issues: "States may avoid creation of" these due process rights "by having scarcely any regulations, or by conferring standardless discretion" on its law enforcement and judicial personnel. *Sandin v. Connor*, 515 U.S. 472, 132 L.Ed.2d 418, 429 (1995). In the end, most States have responsibly enacted laws or adopted procedures for property retrieval, which all persons are charged with knowing and which should not be displaced by a federalized tort law, save under the most compelling circumstances. No such circumstance exists here.

III. Individuals Must Assert Their Procedural Rights Under State Law Before Filing A Due Process Claim.

Not only must individuals be held to notice of the available State law concerning return of their property, they also must exercise their rights under that law before resorting to due process. A person may not ignore an existing procedural remedy, then file suit to enforce that remedy in the name of due process. Respondents, in short, were not denied a remedy, and its existence was not hidden from them. They simply chose to ignore it.

In this respect, respondents sit in the same position as the claimants in *Walker v. Birmingham*, 388 U.S. 307 (1967). Faced

with an injunction forbidding them from engaging in a public march, the protesters declined to apply for a parade permit or undertake a judicial challenge to the injunction. *Id.* at 311. They instead marched, were cited for contempt, and filed a civil rights action under section 1983. *Id.* at 312. In affirming the dismissal of the suit, the Court held that it could not review the illegitimacy of a permit issuing process that was never invoked. *Id.* at 318. So it is here. Respondents never invoked the California statute that entitled them to the very property they now seek.

In the final analysis, respondents were on notice that they needed a court order to get their property back. Instead of following that statutory post-deprivation process and instead of obtaining the relief it provides, they took a different course. They filed a due process claim against the city. That is not the route the Court has prescribed in this area. The lower court's contrary conclusion accordingly should be reversed.

CONCLUSION

For the foregoing reasons, the amici States respectfully urge the Court to reverse the judgment of the court of appeals.

Respectfully submitted,

BETTY D. MONTGOMERY
Attorney General of Ohio
JEFFREY S. SUTTON
State Solicitor
Counsel of Record
ELISE W. PORTER
JEFFREY B. HARTRANFT
Assistant Attorneys General
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215-3428
(614) 466-8980

Counsel for Amici States

July 16, 1998

APPENDIX

STATE AND TERRITORIAL STATUTES REGARDING THE RETURN OF SEIZED PROPERTY

State	Statute or other cite
Alabama	Ala. Code § 15-5-16; Ala. R. Crim. P. 3.13
Alaska	Ak. Stat. § 12.36.020
Arizona	A.R.S. § 13-3922
Arkansas	Ark. R.Crim. P. Rule 15.1-15.5 (1998)
California	Calif. Ann. Pen. Code §§ 1536, 1540
Connecticut	C.G.S. § 54-36a
Delaware	Del. Stat. Ti. 11 § 2311
District of Columbia	D.C. Stat. § 23-525
Florida	Fl. Stat. § 933.14
Georgia	Ga. Stat. 17-5-50, 54
Guam	8 G.C.A. § 150.20 - .30
Idaho	Id. Stat. § 19-4414

Indiana	Ind. Code Ann.35-33-5-5; *Tracy v. State*, 655 N.E.2d 1232
Iowa	Ia. Stat. §§ 809.3 through 809.13
Kansas	Ks. Stat. § 22-2512
Louisiana	La. C.Cr. P. Art. 167; R.S. 15:41
Maine	Me. R. Crim Pro. 41
Massachusetts	Mass. G.L. c. 276 § 3; Sup. Ct. R. 61; *Commonwealth v. Sacco* 401 Mass. 204 (1987)
Maryland	Md. Ann. Code art.27, § 551; *Chu v. Anne Arundel County*, 537 A.2d 250 (1988)
Michigan	MI St. 780.655 § 5
Minnesota	Minn. Stat. 626.04; 626.21; *State v. Davidson*, 471 N.W. 2d 691 (Minn. Ct. App. 1991) *rev'd on other grounds*, 481 N.W. 2d 51 (Minn. 1992)
Mississippi	*Newman v. Stuart* (1922 Miss) 597 So. 2d 609.
Missouri	Mo. Stat. 542.301

Montana	Mont. Code Ann. § 46-5-312
Nebraska	Ne. Stat. § 29-818-820
Nevada	Nev. Stat. 179.105
New Hampshire	N.H. Stat. § 595-A:6
New Jersey	N.J. Stat. Ann. 2C:64-1 et seq.; N.J. Ct. R. 3:5-7(a); *Dragutsky v. Tate*, 620 A. 2d 1065 (App. Div. 1993)
New Mexico	Sec. 29-1-13 &-14 N. M. Stat. Ann., 1978 Comp. (1984); Rule 5-212(A), N.M. Rules Ann., 1998 Ed.
North Dakota	N.D. Code § 29-31.1-02 N.D. R. Crim. P. 41
North Carolina	N.C.G.S. § 15-11.1; N.C.A.G. (July 19, 1994)
Oklahoma	22 Okl. St. § 1232
Oregon	Or. Stat. § 133.633
Pennsylvania	Pa. R. Crim Pro. 324
Rhode Island	RI Stat. § 12-5-7
South Dakota	S.D. Stat. § 23A-37-4; § 23A-37-8.

Texas	Tx C.C.P. Art. 18.17
Utah	Utah Code Ann. 77-24-1.5
Virginia	Va. Stat. § 19.2-58, 60; *see also,* 19.2-54
Washington	Wash. Crim. R. 2.3(e)
Wisconsin	Wi. Stat. § 968.20
Wyoming	Wy. Stat. § 7-7-103